

No. 10728

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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WILLIAM H. BARR, a minor and AGNES D.  
BARR, a minor, by ZEILA M. BARR, their  
guardian,

Appellants,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California  
Southern Division

FILED

SEP 25 1944

PAUL P. O'BRIEN,  
CLERK



No. 10728

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Circuit Court of Appeals  
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

KEITH R. FERGUSON, ESQ.,

311 California Street  
San Francisco, California

JOHN J. TAAFFE, ESQ.,

630 Phelan Building  
San Francisco, California

Attorneys for Plaintiffs and Appellants,

MESSRS. O'CONNOR, NEUBARTH & MORAN  
LEO R. FRIEDMAN, ESQ.,

935 Russ Building  
San Francisco, California,

Attorneys for Defendant and Appellee.

In the Superior Court of the States of California,  
in and for the City and County of San Francisco

No. 317430

WILLIAM H. BARR, minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Plaintiffs,

vs.

THE TRAVELERS INSURANCE  
COMPANY,

Defendant.

### COMPLAINT

Now come the plaintiffs above named and for  
cause of action against the defendant above named  
allege:

#### I.

That plaintiff above named William H. Barr is a  
minor of the age of 17 years; that plaintiff above  
named Agnes D. Barr is a minor of the age of 14  
years; that said William H. Barr and said Agnes  
D. Barr are the minor children of Arthur Barr,  
deceased, and Zeila H. Barr; that said Zeila H.  
Barr by an order duly made, rendered and entered  
in and by the Superior Court of the State of Cali-  
fornia, in and for the County of Marin, on the 2nd  
day of July, 1942, was duly appointed and there  
and then qualified as guardian of the persons and  
estates of said minors, William H. Barr and Agnes  
D. Barr; that said Zeila H. Barr ever since said

2nd day of July, 1942, has been and now is the duly appointed, qualified and acting guardian of the persons and estates of [2\*] said William H. Barr and said Agnes D. Barr.

## II.

That during all of the times herein mentioned defendant has been and is now a corporation organized and existing under and by virtue of the laws of the State of Connecticut.

## III.

That on or about the 26th day of February, 1932, defendant above named, in consideration of a premium and for other good and valuable considerations then paid by said Arthur Barr, deceased, to defendant, then and there insured the life of said Arthur Barr, deceased, and executed and delivered to said Arthur Barr, deceased, a policy of insurance wherein and whereby said defendant agreed to and did insure the life of said Arthur Barr; that a photostat which is a full, true and correct copy of said policy of insurance, is attached hereto, marked Exhibit "A", is hereby referred to and is made a part hereof as though the same were set forth herein in full.

## IV.

That in and by said policy of insurance defendant agreed to pay to said William H. Barr and said Agnes D. Barr in equal shares as beneficiaries under the terms of said policy of insurance the sum

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

of Ten Thousand Dollars (\$10,000) upon the death of said Arthur Barr, deceased, and an additional Ten Thousand Dollars (\$10,000) immediately upon receipt of due proof that the death of said Arthur Barr, resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means, within ninety (90) days from the date of the accident which caused such injuries and of which, except in the case of drowning or internal injuries revealed by an autopsy, there should be a visible contusion or wound on the exterior of the body of said Arthur Barr. [3]

#### V.

That the said Arthur Barr paid all premiums required to be paid by said policy and contract of insurance and duly performed all the conditions and requirements on his part required to be performed by said contract and policy of insurance; that plaintiffs and each of them duly performed all the conditions and requirements on their part required to be performed by said contract and policy of insurance; that ever since said 26th day of February, 1932, said contract and policy of insurance has been and now is in full force and effect.

#### VI.

That said Arthur Barr died on the 6th day of June, 1942, and that the death of said Arthur Barr resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means, to-wit, a tick bite suf-



ferred by said Arthur Barr on or about the 31st day of May, 1942, and which said tick bite caused a visible contusion on the exterior of the body of said Arthur Barr, as well as internal injuries revealed by an autopsy.

## VII.

That the said William H. Barr and the said Agnes D. Barr gave to defendant due notice and proof, in writing, of the death and the said cause thereof of the said Arthur Barr, deceased, and furnished proof of the death of said Arthur Barr, deceased, on the forms required by said defendant and have made demand on said defendant for the payment to them in equal shares of the sum of Twenty Thousand Dollars (\$20,000) as required as aforesaid by said contract and policy of insurance; that said defendant has paid to said William H. Barr and said Agnes D. Barr the sum of Ten Thousand Dollars (\$10,000), but has failed, refused and neglected to pay said additional amount of Ten Thousand Dollars (\$10,000) as required by said contract and policy of insurance and no part of said additional sum of Ten Thousand Dollars (\$10,000) has been paid said William H. Barr and said Agnes D. Barr in equal [4] shares, or otherwise, as required by said contract and policy of insurance, and the whole thereof is now due, owing and unpaid.

Wherefore, plaintiffs pray judgment against defendant for the sum of Ten Thousand Dollars (\$10,000), lawful money of the United States of Amer-

ica, together with interest thereon at the rate of seven percent (7%) per annum from the 6th day of June, 1942, together with costs of suit herein, and for such other relief as to the Court may seem meet and just in the premises.

KEITH R. FERGUSON

JOHN J. TAAFFE

Attorneys for Plaintiffs.

State of California

City and County of San Francisco—ss.

John J. Taafe, being duly sworn on behalf of the plaintiffs in the above entitled action, says:

That he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true; that said plaintiffs are absent from the City and County of San Francisco, State of California, where their attorney John J. Taafe has his office, and that the affiant is one of the attorneys for plaintiffs and therefore makes this affidavit of verification.

JOHN J. TAAFFE

Subscribed and sworn to before me this 30th day of March, 1943.

(Seal)

JACOB S. MEYER

Court Commissioner of the City and County of San Francisco, State of California. [5]

# The TRAVELERS

## INSURANCE COMPANY HARTFORD CONNECTICUT

Number	-1687927	Amount
Insured	Arthur Barr	Insurance \$10,000
Age	41	Retirement Income \$100.00
Beneficiary	William H. Barr, Son & Agnes D. Barr, Daughter, in equal shares, if living, otherwise to Zella C. Barr, Wife.	Maturity Date February 16, 1956
Premium	\$34.30	
How Payable	Monthly	For 24 Full Years
When Payable	On the 16th	day of each month
Effective Date	February 16, 1932	In each year.

### By this Contract of Insurance Agrees to Pay

to the above named Beneficiary at the Home Office of the Company in Hartford, Connecticut, immediately on receipt of due proof of the death of the insured, during the continuance of this contract, before the Maturity Date, and provided there shall have been no default in premium payments, the amount of insurance stated above, or the cash value thereof as determined on the second page if it shall be greater.

If the insured shall be living on the Maturity Date, this insurance shall then terminate and if all premiums hereunder shall have been paid and if there shall be no indebtedness to the Company on account of this contract, then the insured shall receive the first installment of the Retirement Income stated above and a like amount monthly thereafter during the natural life of the insured.

If there shall be an indebtedness hereunder, the amount of such monthly income shall be reduced in the proportion that such indebtedness bears to the cash payment available at the Maturity Date and the indebtedness shall thereby be discharged.

If the Insured shall die after the Maturity Date and before having received one hundred such monthly payments, the remainder thereof shall be payable as they become due to the Beneficiary hereinbefore named who shall have the option of commencing such payments into one sum on the basis of interest at the rate of three and one-half per centum per annum.

This contract is issued in consideration of the signed application for this insurance which is made stated, in exchange for a receipt signed by the President or a Secretary and countersigned by an authorized agent of the Company.

The first such premium payment shall be made on the delivery of this contract, and a like payment on or before the dates specified above for premium payments in each year, until the premiums for the full number of years above stated shall have been paid, or until the prior death of the insured.

Premiums shall be paid in advance at the Home Office or to an authorized agent of the Company. This insurance shall be effective from the date so specified above. The Insurance Years and all subsequent provisions for Cash Loans, Cash Values, Paid-up and Automatic Term Insurance and Paid-up Retirement Income Values are computed from that date.

This contract shall be incontestable after it shall have been in force for a period of one year from the date of issue except for non-payment of premiums, and except for violation of the conditions of this contract relating to military or naval service in time of war if such service shall be restricted by contract entered into at date of issue. It is otherwise free from conditions as to residence, occupation, travel or place of death.

This contract is subject to the privileges and conditions recited on the subsequent pages hereof.

In Witness Whereof THE TRAVELERS INSURANCE COMPANY has caused this instrument to be executed at

Hartford, Connecticut, this Twenty-sixth day of February 1932

*Emilia J. Barr*  
Department Secretary

*Wm. H. Barr*  
President, Life Department

*L. E. Barr*  
President

Insurance To Age 65 with Retirement Income

Premiums Payable For 24 Years Non-Participating









Rider to be Attached to Contract No. 1687927

Issued upon the Life of Arthur Barr

Anniversary of Date of Birth	Amount of Income	Income Payable	Certain Period
Option 1.	50th	1.69	Monthly
Option 2.	55th	3.44	Monthly
Option 3.	60th	5.99	Monthly
			100 Months
			100 Months
			100 Months

If all the premiums under the contract shall have been paid and if there shall be no indebtedness thereunder the Insured may, in lieu of any other settlement provided in the contract, elect one of the options stated above, and upon written request made by the Insured prior to the anniversary of the contract nearest the anniversary of the date of birth, the Company will pay for each \$1,000 of insurance a life income in the amount stated above, the first such payment to be made as of the anniversary elected, payments thereafter to be made at the intervals above stated. If the Insured shall die after the anniversary elected and before receiving all the payments for the certain period specified above, payments for the remainder of such period shall be made in like manner to the Beneficiary named in the contract.

THE TRAVELERS INSURANCE COMPANY

L. M. ROBOTHAM

Department Secretary

Hartford, Connecticut February 26, 1932.

47008 [8]

Rider to be Attached to Contract No. 1687927

Issued Upon the Life of Arthur Barr

Special Option available at the end of the 15th Contract Year

Upon written request made by the Insured within three months of the expiration of the above specified contract year the Company will without evidence of insurability, provided the contract shall be free from indebtedness, indorse the contract for paid-up life insurance in the amount of 10,270.00

Such paid-up insurance shall be in lieu of any other settlement provided in the contract.

THE TRAVELERS INSURANCE COMPANY  
L. M. ROBOTHAM

Department Secretary

Hartford, Connecticut February 26, 1932.

46603 [9]

Additional Indemnity Contract

Insured Arthur Barr

Under Life Contract No. 1687927

Additional Indemnity \$10,000

Premium \$1.10

Payable Monthly

The Travelers Insurance Company agrees to pay the Beneficiary named in the above numbered Life Contract the amount of additional Indemnity above stated in addition to the amount of insurance payable in the event of the death of the Insured under the said Life Contract immediately upon receipt of due proof that the death of the said Insured has resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means within ninety days from the date of the accident which shall have



caused such injuries and of which, except in the case of drowning or internal injuries revealed by an autopsy, there is a visible contusion or wound on the exterior of the body, and provided such death does not result from

- (a) Disease of any kind, directly or indirectly;
- (b) Suicide, while sane or insane;
- (c) Any act of war, or while in military or naval service in time of war;
- (d) Injuries sustained while in any boat or vessel for submarine navigation;
- (e) Any hazard of aviation except as hereinafter provided.

It is further agreed that the Additional Indemnity hereby provided will be paid if the death shall result from injuries caused by any of the hazards of aviation while the insured is riding as a passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and while operated by a licensed pilot on a regular passenger route between definitely established airports, but shall not be payable if the death of the Insured shall result from injuries sustained in any military or naval aircraft or in any form of aviation travel or hazard not herein specified, nor for death resulting from injuries sustained by the Insured while acting as a pilot, navigator or mechanic of an aircraft.

It is further agreed that this Additional Indemnity will be paid only in the event that the accident which shall cause such death shall occur before a default in the payment of any premium required under this Contract or under the said Life Con-

tract, before any benefit or value under any of the provisions in such Life Contract other than cash loans shall have been claimed and allowed and before the anniversary of such Life Contract nearest the sixty-fifth anniversary of the birthday of the Insured, if the insurance extends beyond such anniversary.

This Contract is issued in consideration of the premium specified above, payable as hereinabove stated while this Contract shall remain in force on the same dates and under the same conditions as the premium on the said Life Contract. This Contract may be cancelled at any time by the Insured without prejudice to said Life Contract.

THE TRAVELERS INSURANCE COMPANY,

L. M. ROBOTHAM

Department Secretary

R. O. MCGOWAN

Recorder, Life Department

Dated at Hartford, Connecticut February 26, 1932.  
Additional Indemnity Contract.

47411 [10]

Provision for Waiver of Premiums  
in event of  
Permanent Total Disability

Attached to and made part of a contract of Life  
Insurance issued by The Travelers Insurance  
Company

Under Contract No. 1687927 to Arthur Barr the  
Insured

Additional Monthly Premium \$1.50

In consideration of the application which forms a part of the above numbered contract and of the additional premium hereinabove stated payable on the same dates and under the same conditions as the premium on the contract to which this provision is attached, the following provisions for permanent total disability benefits are hereby made a part of said contract:

Upon due proof, following notice of claim submitted during the lifetime of the Insured, that since the payment of the initial premium upon the contract and upon this provision, before a default in payment of any subsequent premium, before the Maturity Date, if any, so designated on the first page of the contract and before the anniversary of the contract nearest the sixtieth anniversary of date of birth, the Insured has, during the continuance of the contract, become and at the time of giving such notice is wholly disabled by bodily injuries or disease and thereby prevented from engaging in any occupation or employment for remuneration or profit and has been so prevented for a period of

not less than six consecutive months the following benefits will be granted:

1. The Company will waive the payment of any premiums which may fall due on the contract during such disability and will refund any premiums previously paid during such disability, but no waiver or refund will be made for a period in excess of one year prior to such notice. The privileges and values of the contract shall be the same as if such premium payments were made by the Insured.

2. Any premiums waived under this provision will not be deducted in any settlement under the contract.

3. Independently of all other causes the Company will consider as total disability the entire and irrecoverable loss of the sight of both eyes, or of the use of both hands, or of both feet, or of one hand and one foot.

If any premium due under the contract shall be in default when notice of claim hereunder is received disability benefits shall be allowed only if the total disability shall have existed continuously from a date prior to expiration of the grace period of the first premium in default, and provided such due date is subsequent to date of payment of the initial premium hereunder. If the inception of such disability shall have been during such grace period the Insured shall be liable to the Company for the payment of premium then due.

If and when the Insured shall cease to be totally disabled, all benefits hereunder shall cease and pre-

miums falling due thereafter shall be payable by the Insured.

Failure to present notice of disability within the time provided herein shall not invalidate any claim if it shall be shown that such notice was given as soon as was reasonably possible.

Upon written request signed by the Insured and upon return of this provision for proper indorsement, the Company will annul this provision and the additional premium charged for these benefits shall no longer be payable.

In any event no premium for this provision shall be payable on or after the anniversary of the contract nearest the sixtieth anniversary of the date of birth of the Insured, and none of the benefits herein described shall be allowed for any disability which has its commencement after such anniversary.

In Witness Whereof The Travelers Insurance Company has caused this provision to be executed at Hartford, Connecticut, this Twenty-sixth day of February 1932.

L. M. ROBOTHAM

Department Secretary

R. O. MCGOWAN

Recorder, Life Department

L. E. ZACHER

President

Standard Disability Provision  
Premium Waiver











## General Conditions

Modifications, etc.—No agent can make, alter or discharge this contract or extend the time for payment of premiums, nor can this contract be varied or altered or its conditions waived or extended in any respect, except by the written agreement of the Company, in compliance with the law of the state in which the contract is issued, signed by the President, or one of the Vice-Presidents or Secretaries, whose authority will not be delegated

Misstatement of Age—If the age of the Insured was incorrectly stated the amount payable hereunder shall be the insurance which the actual premium paid would have purchased at the true age of the Insured. Age will be admitted on satisfactory proof.

Date of Issue—The date of issue as used in this contract means the date on which this instrument is executed at Hartford, Connecticut.

Non-Payment of Premiums—If any premium shall not be paid on or before the date when due the liability of the Company shall be only as hereinbefore provided.

Assignment—No assignment hereof shall be binding upon the Company unless made by an instrument in writing indorsed upon this contract or attached hereto, nor unless a duplicate shall be furnished to the Company forthwith upon its execution. The Company shall not be held responsible for the validity of any such assignment. Any claim made under an assignment shall be subject to proof of interest and extent thereof.

Indebtedness—Any indebtedness to the Company on account of this contract will be deducted in any settlement hereunder.

Suicide—In case of suicide committed while sane or insane within one year from date of issue of this contract the limit of recovery hereunder shall be the premiums paid.

Reserve Basis—The reserve for which funds are to be held upon this contract shall be computed upon the American Experience Table of Mortality and interest at  $3\frac{1}{2}\%$  per annum by the net level premium reserve method.

Entire Contract—This instrument and the application constitute the entire contract between the parties hereto, and all statements purporting to be made by or on behalf of the Insured shall in the absence of fraud be deemed representations and not warranties and no statement shall avoid the contract or be used in defence to a claim under the contract unless it be contained in the application herefor and a copy of such application is attached hereto. [13]

The Travelers  
Insurance Company  
Hartford Connecticut  
No. 1687927  
Arthur Barr  
Insurance to Age 65 with  
Retirement Income  
Non-Participating

In the event of death, notice should be given immediately to the nearest branch office of the Company.

It is not necessary for the Insured or the Beneficiary to employ any person to collect any benefit provided in this contract.

Phone S. R. 229

(Cut)

Kent & Minto

Insurance Agency, Inc.

“Complete Insurance Service”

711 Fourth St., San Rafael

[Endorsed]: Filed Mar. 31, 1943 H. A. van der Zee, Clerk, by D. E. Dunn, Deputy Clerk.

[Endorsed]: Filed May 6, 1943, U. S. District Court. [14]

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No. 317430

PETITION FOR REMOVAL TO THE  
UNITED STATES DISTRICT COURT

To the Honorable Superior Court of the State of California, in and for the City and County of San Francisco;

Your petitioner, The Travelers Insurance Company, a corporation, respectfully shows and alleges as follows:

I.

Your petitioner is the defendant in the above entitled action, and the only defendant in said action served with process therein. Said action, as appears from plaintiff's Complaint on file therein,

is of a Civil nature at law, brought by plaintiff to recover judgment against said defendant in the sum of Ten Thousand and No/100 Dollars, (\$10,000.00), together with interest thereon at the rate of Seven per cent, (7%), per annum from the 6th day of June, 1942, and together with plaintiff's costs of suit and other relief as to the court may seem meet and proper, which claim petitioner wholly contests and denies; [15] and petitioner alleges that the amount involved and the matter in dispute or controversy in said action, exceed, and that each of them exceeds, exclusive of interest and costs, the sum or value of Three Thousand and No/100 Dollars, (\$3,000.00).

## II.

That plaintiffs, William H. Barr, a minor, and Agnes D. Barr, a minor, and Zeila H. Barr, guardian of said minors, were and each of them was, at the time of the commencement of this action, and that each of them ever since have been and they now are and each of them now is, a citizen of the State of California and a resident of and the Southern Division of the Northern District of said State. That your petitioner, The Travelers Insurance Company, a corporation, the defendant, was at the time of the commencement of said action and ever since has been and now is a corporation incorporated and existing under and by virtue of the laws of the State of Connecticut, and a citizen and resident of said last named state and a non-resident of the State of California.

## III.

That at the time of the commencement of said action, there was and ever since has been and still is therein, a controversy wholly between citizens of different States which can be fully determined between them, that is to say, between the plaintiffs, citizens of the State of California, resident in the Southern Division of the Northern District of said State, on the one hand, and a corporation, defendant and petitioner herein, a citizen and resident of the State of Connecticut, on the other hand.

## IV.

That service of summons was made in this action [16] on your petitioner on the 31st day of March, 1943, in the City and County of San Francisco, State of California, and your petitioner is not required by the laws of the State of California or by the rules of the above entitled court in which said action is brought, to answer or plead to the complaint therein until the 10th day of April, 1943.

## V.

That by reason of the foregoing facts, your petitioner alleges that said cause is properly removable to the United States District Court, in and for the Northern District of California, upon the ground of the diverse citizenship of the parties; and it petitions for the removal of said action to said United States District Court upon that ground.



## VI.

Your petitioner files and offers herewith, its bond with good and sufficient surety of its entering in the Southern Division of the United States District Court in and for the Northern District of California, within thirty days from the date of the filing of this petition for the removal of said cause, a certified copy of the record of said action and for paying all costs that may be awarded by said District Court if said Court shall hold that said action was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this Honorable Court accept said bond as good and sufficient, to make its Order for the Removal of said action to the Southern Division of the United States District Court, in and for the Northern District of California, pursuant to the act of Congress in such cases made and provided, and for such other and further Order as may be proper, and to cause all the records herein to be removed to said District Court, and that no other or [17] further proceedings be had in said action in said Superior Court of the State of California, in and for the City and County of San Francisco.

THE TRAVELERS INSUR-  
ANCE COMPANY,

By LEO. R. FRIEDMAN

O'CONNOR, NEUBARTH &  
MORAN

LEO R. FRIEDMAN

Attorneys for The Travelers  
Insurance Company [18]

State of California,  
City and County of San Francisco—ss.

Leo R. Friedman, being first duly sworn, deposes and says:

That he is one of the attorneys for the petitioner in the foregoing action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true; that this verification is made by affiant and not by said petitioner for the reason that said petitioner and all officers authorized to swear oaths on its behalf, are absent from City and County of San Francisco in which City and County the attorneys for said petitioner have their offices.

LEO R. FRIEDMAN

Subscribed and sworn to before me this 8th day of April, 1943.

[Seal]                      LOUIS WIENER

Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed May 6, 1943. U. S. Dist.  
Court. [19]

[Title of Court and Cause.]

No. 317430

NOTICE OF PETITION FOR REMOVAL TO  
THE UNITED STATES DISTRICT COURT

(With copy of Petition and Bond for Removal  
Attached)

To: Plaintiffs above named and to Messrs. Keith R.  
Ferguson and John J. Taafe, attorneys at law,  
attorneys for said Plaintiffs:

You and Each of You Will Please Take Notice  
that The Travelers Insurance Company, a corpora-  
tion, one of the defendants in the above entitled  
action, intends to file therein, a petition and bond  
for removal, copies of which petition and bond are  
attached hereto and made a part hereof, reference  
to which is hereby expressly made for further par-  
ticulars, and that it will, on Friday, the 9th day  
of April, 1943, at 10 o'clock A. M. of said day, or  
as soon thereafter as counsel can be heard, apply  
to the above entitled court at the Courtroom  
thereof, Law and Motion Department, in the City  
Hall at the City and County of San Francisco, [20]  
State of California, Polk Street, Van Ness Ave-  
nue and McAllister Street, for an Order upon  
said petition and bond and upon this Notice, re-  
moving said cause to the Southern Division of the  
United States District Court, in and for the North-  
ern Division of California.



Dated: April 8, 1943.

O'CONNOR, NEUBARTH &  
MORAN

LEO R. FRIEDMAN

Attorneys for Petitioner.

[Endorsed]: Filed Apr. 8, 1943. H. A. van der Zee, Clerk By D. T. Wood, Deputy Clerk.

[Endorsed]: Filed May 6, 1943. U. S. District Court. [21]

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[Title of Superior Court and Cause.]

### BOND ON REMOVAL OF CAUSE

Know All Men by These Presents: That We, The Travelers Insurance Company as Principal and American Surety Company of New York, a corporation organized under the laws of the State of New York, and duly authorized to transact business in the State of California, as Surety, are held and firmly bound unto William H. Barr, a minor and Agnes D. Barr, a minor by Zeila H. Barr, their guardian, Plaintiffs in the above-entitled action, their successors and assigns, in the sum of Five Hundred and No/100 Dollars, lawful money of the United States of America, for the payment of which, well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed and Sealed this 7th day of April, 1943.

The Condition of the above obligation is such, that Whereas, said The Travelers Insurance Company has petitioned or is about to petition the Superior Court of the City and County of San Francisco, State of California, for the removal of that certain cause therein pending wherein William H. Barr, a minor and Agnes D. Barr, a minor, by Zeila H. Barr, their guardian, are the Plaintiff, and the said The Travelers Insurance Company is the Defendant, to the Southern Division of the District Court of the United States, for the Northern District of California, for further proceedings on grounds in said petition set forth, and that all further proceedings in said action in said Superior Court of the City and County of San Francisco, State of California, be stayed:

Now, Therefore, if said petitioner, The Travelers Insurance Company, shall enter in said District Court of the United States, aforesaid, within thirty (30) days from the date of the filing of the petition, a certified copy of the records of said suit, and shall pay all costs that may be awarded therein by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this ob-

ligation shall be void; otherwise to remain in full force and effect.

THE TRAVELERS INSUR-  
ANCE COMPANY

By A. C. de SOUSA

Principal

AMERICAN SURETY COM-  
PANY OF NEW YORK

By L. E. PLATT

Resident Vice-President.

Bond #774265-K

Prem. \$10.00 Term.

Attest:

B. D. SPERRY

Resident Asst. Secretary.

[Endorsed]: Filed May 6, 1943. U. S. District  
Court. [22]

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No. 317430

[Title of Court and Cause.]

ORDER FOR REMOVAL

On reading the petition of defendant, The Travelers Insurance Company, for the removal of the above entitled cause to the Southern Division of the United States District Court in and for the Northern District of California, and the bond for removal on behalf of said defendant, The Travelers Insurance Company, which said petition and bond have been heertofore filed in said action, and

it appearing to this Court that written notice of said petition and bond for removal was duly given by said defendant to plaintiffs prior to filing said petition and this matter coming on for hearing said bond is hereby approved, and accepted as good and sufficient and all things being by this Court heard and considered.

It is hereby ordered that said cause be and the same is hereby removed to the Southern Division of the United States District Court in and for the Northern District of California.

Dated: San Francisco, California, April 9, 1943.

THERESA MEIKLE

Judge of the Superior Court

[Endorsed]: Filed Apr. 9, 1943. H. A. van der Zee, Clerk. By H. Brunner, Deputy Clerk.

[Endorsed]: Filed May 6, 1943. U. S. Dist. Court. [23]

In the Southern Division of the United States  
District Court, in and for the Northern Dis-  
trict of California

No. 22609-G

WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Plaintiffs,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Defendant.

### ANSWER

Now comes The Travelers Insurance Company,  
the defendant in the above entitled action, and  
files this its answer to the complaint on file in  
said action and denies and avers as follows:

Answering paragraphs III and IV of said com-  
plaint, said defendant admits and avers that on  
the 26th day of February, 1932, defendant exe-  
cuted and delivered to said Arthur Barr its policy  
of insurance, a copy of which is attached hereto  
and marked Exhibit "A" and made a part hereof,  
save as thus admitted and averred, defendant de-  
nies each and all of the allegations of paragraphs  
III and IV in said complaint and each and every  
part thereof.

Answering paragraph V of said complaint, de-  
fendant denies that plaintiffs and/or each or any  
of them, duly performed all the conditions and/or  
requirements on their part required to be [24]

performed by said policy of insurance in this that plaintiffs failed and still fail to furnish defendant with proof that the death of the said Arthur Barr resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means as provided in said policy or at all.

Answering paragraph VI of said complaint, as to the allegation in said paragraph that said Arthur Barr received a tick bite said defendant has no information or belief and basing its answer on that ground, said defendant denies said allegation; said defendant denies that the death of said Arthur Barr resulted from bodily injuries or any bodily injury effected directly and/or independently of all other causes through external, violent and/or accidental means and denies that the death of said Arthur Barr resulted from a tick bite suffered by said Arthur Barr and/or which said tick bite caused a visible contusion on the exterior of the body of said Arthur Barr and/or internal injuries or any injury revealed by an autopsy or otherwise.

Answering paragraph VII in said complaint, defendant denies that said William H. Barr or said Agnes D. Barr gave to defendant due notice and/or proof of the death and/or the cause thereof of Arthur Barr and/or furnished proof of the death of said Arthur Barr on the forms required by said defendant or otherwise that the death of said Arthur Barr resulted from bodily injuries effected directly and/or independently of all other



causes through external, violent and/or accidental means. And further denies that the payment of Ten Thousand Dollars (\$10,000) or any additional sum was required by said contract and policy of insurance and denies that defendant has failed, refused and neglected to pay any sum required by said contract and policy and due thereon.

Wherefore, defendant prays that it be hence dismissed with its costs.

O'CONNOR, NEUBARTH &  
MORAN

Attorneys for Defendant [25]

State of California,  
City and County of San Francisco—ss.

Arthur S. Holman, being first duly sworn, deposes and says:

That he is an officer, to-wit: Manager of The Travelers Insurance Company, the defendant in the foregoing action; that as such he makes this verification on its behalf; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

ARTHUR HOLMAN



Subscribed and sworn to before me this 11th day of June, 1943.

[Seal]                      LOUIS WIENER

Notary Public, in and for the City and County of  
San Francisco, State of California. [26]

[Printer's Note: Copy of Policy No. 1687927, attached here as Exhibit A to the Answer, is set out in full at pages 7 to 19 of this printed record. Therefore it is not reproduced again here.]

(Receipt of Service.)

[Endorsed]: Filed June 11, 1943.

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District Court of the United States  
Northern District of California  
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 2nd day of November, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Louis E. Goodman, D. J.

[Title of Cause.]

No. 22609-G Civil

This case came on this day for trial before the Court sitting without a jury. John J. Taaffe, Esq. appeared as attorney for plaintiffs, and Leo R.

Friedman, Esq. appeared as attorney for defendant. The attorneys having orally stipulated thereto in open Court, it is Ordered that this case be and the same is hereby consolidated for trial with case No. 22613-R, Zeila Barr vs. The Equitable Life Assurance Society of the United States. Thereupon the two cases proceeded to trial. Mr. Taaffe made a statement to the Court on behalf of the plaintiffs. Mr. Mackay made a motion for judgment in favor of the defendant The Equitable Life Assurance Society of the United States, which said motion was ordered denied. Mr. Friedman made a motion for judgment in favor of the defendant The Travelers Insurance Company, which said motion was ordered denied. Louis Nave, Le Roy H. Briggs, M.D., Malcolm H. Merrill, M.D., Monroe D. Eaton, M.D., and Karl F. Meyer, M.D., were sworn and testified on behalf of the plaintiffs. Mr. Friedman introduced in evidence and filed Defendants' Exhibit A. Ordered that the further trial of these cases be continued until November 3, 1943, at 10:00 o'clock A. M.

Minute Order Nov. 2, 1943. [36]

In the United States District Court for the Northern District of California, Southern Division

No. 22609-G

WILLIAM H. BARR, a minor, and AGNES D. BARR, a minor, by Zeila H. Barr, the guardian,

Plaintiffs,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Defendant.

JUDGMENT AND ORDER  
OF DISMISSAL

The above entitled action (consolidated with the case of Zeila Barr v. The Equitable Life Assurance Society of the United States, No. 22613-R) having come on regularly for trial before the above entitled court, sitting without a jury, on November 2, 3, and 4, 1943, the plaintiffs being represented by John J. Taaffe, Esq., their attorney, and the defendant being represented by Messrs. O'Connor, Neubarth and Moran and Leo. R. Friedman, Esq., its attorneys, and on said last mentioned date, the plaintiffs having completed the presentation of their evidence and having rested their case in chief, the defendant moved the above entitled court, under and pursuant to Rule 41(b) of the Rules of Civil Procedure for the District Courts of the [37] United States, for a dismissal of the above entitled action on the ground that upon the facts

and the law the plaintiffs had shown no right to relief, and plaintiff having objected to said motion and the motion having been argued by counsel for plaintiffs and counsel for defendant and the same having been submitted to the court for decision and the court finds that said motion is meritorious and should be granted and that under the law and upon the facts and the law the plaintiffs have shown no right to relief;

It is hereby Ordered, Adjudged and Decreed and this court does hereby order, adjudge and decree that plaintiffs take nothing by reason of their complaint on file herein and that the above entitled action be and the same is hereby dismissed.

Dated: November 10th, 1943.

LOUIS E. GOODMAN

United States District Judge

Approved as to form pursuant to Rule 22 of the Rules of the District Court of the United States for the Northern District of California.

KEITH R. FERGUSON

JOHN J. TAAFFE

Attorney for Plaintiffs.

[Endorsed]: Filed Nov. 10, 1943. [38]

In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 22,613-R

ZEILA BARR,

Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCI-  
ETY OF THE UNITED STATES,  
Defendant.

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No. 22,609-G

WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Plaintiffs,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Defendant.

Before: Hon. Louis E. Goodman, Judge.

Counsel Appearing:

For the plaintiffs:

John J. Taaffe, Esq.

For defendant Travelers Insurance Company:

Leo R. Friedman, Esq.

For defendant Equitable Life Assurance Society:

Pillsbury, Madison & Sutro, by

Harlow Rothert, Esq., and

William H. Mackey, Esq. [41]

Tuesday, November 2, 1943

10:00 A. M.

OPENING STATEMENT ON BEHALF  
OF THE PLAINTIFF

Mr. Taaffe: May it please your Honor, these actions were instituted by the wife and by the two minor children of the deceased, one Dr. Arthur Barr, a dentist, who resided and practiced his profession in San Rafael in Marin County, under the double indemnity provisions of two insurance policies, one issued by the Equitable Life Assurance Society of the United States, and the other by the Travelers Insurance Company.

We expect to show in this case, may it please your Honor, that Dr. Barr, up until a few days before his death, was a perfectly healthy, in fact an extraordinarily fine specimen of physical manhood; that on the 27th day of May of last year, he, his brother, and another gentleman, who was a witness, went to the northeastern portion of Lassen County, California, antelope hunting; that they remained in that vicinity for three days. They killed two antelope, having had permits from the State and Game Commission for that purpose, and on the 31st day, I believe it was, of May of last year, on their way home they stopped in Reno, went to an auto court of Reno to bathe, and while they were in that auto court the deceased called the attention of one of his friends who was present, that is, a gentleman other than his brother, to the fact that a tick had bitten him and had



imbedded itself in his abdomen. That was along about one o'clock in the afternoon.

About nine o'clock that evening, while the deceased and this friend were lying in bed or on the bed reading a paper, the friend called attention to the deceased, or the deceased called his attention to the fact that there were spots that looked somewhat like measles, principally upon the wrist and under the arm of the decedent. The decedent at that time [41-a] attributed the spots to nervousness only and dismissed the matter, or both parties dismissed the matter at that time.

We then expect to show, may it please your Honor, that on the following day, Monday, June 1, I believe it was, he got up at two o'clock in the morning and went fishing in the Lake Tahoe region, making an appointment to see his brother and friend about eleven o'clock in Truckee. They drove to Truckee and met him at eleven o'clock, picked him up in the machine, and that afternoon they returned home.

About five o'clock that evening he arrived to his home, at which time there were present his wife, his mother-in-law, and another lady, a friend of the family, and before taking a shower, he called their attention to a rash on the calves of both legs, pulling up both of his trousers, his long underwear, and showing them the rash.

The following day, which was to say, June 2, I believe was the date, he came over to San Francisco to do some shopping and did some shopping, and also to call on Dr. Briggs for a general check-



up, Dr. Leroy Briggs. He had not complained at any time in his life from any illness up to this point. He was complaining of no illness of any kind, but Dr. Briggs gave him a general check-up, among other things taking his temperature. His temperature was perfectly normal. His heart action was strong, and he found him in every particular to be healthy.

He returned home on that night, Tuesday, June 2, and went to bed. The following day, Wednesday, June 3, he went to work, to his offices, performing his duties as a dentist throughout the day. He came home Wednesday evening at approximately the usual hour, around six o'clock, and at that time made his first complaint about not feeling well. Those present noticed the [41b] flushed condition of his face. He did not eat any dinner, ate only a few bites of dinner, I should say, and went to bed.

The following morning, Thursday morning, he did not arise at his usual hour and his wife, because he was ordinarily a very early riser, and because he had not arisen when eight o'clock came around, went to his bedroom and asked him how he felt and if he was going to work. He said no. He was very confused or rather confused in his answers.

As we contend, the germs introduced into the system, or the bacteria, by the tick bite were beginning to show their first effects. She called first Dr. Briggs' office to advise him of his condition. He had left for the East overnight. She then called

in Dr. Marston of San Rafael. Dr. Marston examined him, found him confused mentally, and then gave certain advises which were carried out.

He progressively became worse during this day, Thursday. That afternoon, upon a phone call from the now widow, Dr. Marston again called, immediately ordered him hospitalized, and he was taken to the Cottage Hospital in San Rafael by ambulance.

Thursday afternoon he became progressively worse, went into complete delirium, completely uncontrolled shouting, screaming—out of his head entirely. He was given blood transfusions and other attentions, and on the following night, that is, Friday night, or I should say, Saturday morning, after being in the hospital less than forty-eight hours, four a.m. Saturday morning, he passed away.

We expect to show, may it please your Honor, that the district in which they were hunting in Lassen County is infested with *Dermacentor andersoni*, as it is called in [41c] technical medical terms, or the tick which carries microorganisms which react in this manner infested that area.

We expect to show that after his death, his wife took his clothing and put it away or sent it to the cleaners and another tick fell off the clothing, and that that tick was sent to the University of California for identification, that it was identified as a *Dermacentor andersoni*, as it is called.

We expect to show that he was embalmed be-

fore an autopsy was performed by doctors representing the insurance company and doctors representing his family when they made claim for double indemnity. Specimens of his tissue were submitted to disinterested doctors, scientists connected with the University of California, and they found in the lung organisms which are known in medicine as Rickettsia bodies, Rickettsia bodies being the micro-organisms which are transmitted from a tick from the region that we speak of in Lassen County to human beings, which affect human beings, and which cause death.

We expect to show that his death was typical of a tick infection.

We expect to show that the autopsy revealed him to be in other respects perfectly healthy—in fact, a very powerful and strong individual, but that these Rickettsia bodies had invaded his lungs, causing an infection of the lungs, resulting in what is known in medical as well as ordinary parlance as a bronchial pneumonia of the so-called atypical as distinguished from typical type; in other words, a virus type of pneumonia because of the fact that the tick communicates a virus and kills human beings by the transmission to the human being of the virus.

We expect to show that prior to his death the attending [41d] physician notified the State Board of Health of the State of California of the fact that he was attending a tick-bite case; that after this, the representative of the State Board of

Health called at a laboratory conducted by the sister of the attending physician and secured specimens of the decedent's blood which had been taken prior to his death; that those specimens were subjected to two different types of tests; that the blood was injected by one of the doctors connected with the State Board of Health into rats, and that other specimens of the blood were injected into guinea pigs, and that agglutination tests were made for the discovery of what is known as Proteus in the medical profession, and that those tests were negative. We expect to show it was more or less expected that they would be negative because the disease progressed so rapidly and killed him so fast that sufficient time had not elapsed during the course of the disease to get proper specimens.

We expect to show as a matter of law that a tick bite, or, rather, an insect bite for that matter is an accident in the meaning and terms of insurance policies of this kind.

The Court: Isn't the term in the policies "accidental means"?

Mr. Taaffe: Yes. I can give your Honor the exact language of the policy.

The Court: It is not important.

Mr. Taaffe: I do not think there will be any dispute on the law of the subject. There isn't any question about just what the law is in that regard. Having shown these facts, if your Honor please, we hope to obtain the recovery provided for, an

additional indemnity of \$10,000 in each case in favor of the widow and the two minor children.

[41e]

The Court: Are you going to have some evidence to the effect that there have been cases where these tick bites produced a virus?

Mr. Taaffe: No question about that. That will be beyond dispute.

The Court: I suppose the question in dispute is whether the man died from pneumonia or whether from a tick bite, to put it colloquially.

Mr. Taaffe: I personally do not think there will be any dispute that he died from what is called an atypical pneumonia.

The Court: Regardless whether the tick bite caused it or not?

Mr. Taaffe: That is right. We expect to prove that a tick bite caused that very condition.

There is one situation I would like to explain to your Honor before we go further. It does not involve the issues. As your Honor can readily see, numerous doctors will be called, and while ordinarily I do not attempt to suit the convenience of witnesses to the possible discommode of the court, doctors, as your Honor knows, in these times, are extremely busy.

The Court: Yes, I understand that.

Mr. Taaffe: I have tried to schedule their appearances here so they would not be greatly inconvenienced, and if the Court hasn't any objection to it—I know counsel on the other side will not—we will extend the same courtesy to them if



it becomes necessary. We may have to do two things. We may have to put on some proof out of order on that account, or we may have to call witnesses from the stand, or it may even result in our asking a short delay to produce a doctor in a [41f] given time.

The Court: You gentlemen can agree on everything else except the medical question, can't you?

Mr. Taaffe: That is it. I do not think there is any dispute about it.

The Court: What is the necessity about making any preliminary proof in this case?

Mr. Mackay: As to what? [41g]

The Court: Do you gentlemen agree that the only question in the case is the medical question?

Mr. Rothert: I do not think we could, your Honor. On behalf of Equitable I would say that we have in effect filed a general denial and we dispute the fact that this man was bitten by an infected tick, and we intend to prove by medical testimony that his death did not result from the injection of any rickettsial bodies or tick bite.

The Court: Then there are two issues in the case: First, whether he was bitten by the tick, and, second, whether it caused his death.

Mr. Rothert: Whether the tick was infected, and, third, if he was bitten by such a tick, it had any connection whatsoever with his death.

The Court: There is nothing else disputed in the case?

Mr. Rothert: There is one other issue, which is one of law, and which we would like to raise,

your Honor, and I might as well raise it now on the basis of counsel's opening statement.

The complaint in the action against Equitable has annexed and incorporated as a part of the complaint a copy of the policy, which contains a clause to the effect that there shall be no recovery of the double indemnity in the event that death results directly or indirectly from disease. Counsel himself in his opening statement has said that the cause of death was a disease, namely, virus pneumonia or, as he calls it, atypical pneumonia, and even if it were conceded for the [42] purpose of argument that the man had been bitten by a tick, and by an infected tick, and even if it were proved to your Honor's satisfaction that a pneumonia could result from transmission of rickettsial bodies by a tick bite, although on the other issues I believe we will show that that is unknown in medical science, still we believe that the case would, so far as Equitable is concerned, be within the exception which is set forth in the policy, and so for that reason at this time I move for judgment on plaintiff's opening statement.

The Court: Doesn't that raise——

Mr. Rothert: Death resulted directly or indirectly from the disease.

The Court: I think I have heard of some of these cases where, for instance, the question is whether there is a traumatic causation of a coronary occlusion. I think there is some divergence of opinion among the doctors on that. Disease follows a blow, and the question arises whether that



comes within the terms of the accident policies. Is there any law on that, as to whether or not you would be liable on the policy if there was an accidental bringing about of a disease due to a virus or germ?

Mr. Rothert: I do not think law is in a settled state on that issue. I think the question is pro and con.

Mr. Taoffe: I can give your Honor law on it as to the direct contrary, that they would be liable.

The Court: I will deny the motion at this time.

Mr. Friedman: May it be considered that the Travelers Insurance Company made the same motion?

The Court: Very well. I take it you won't have any formal proof in this case. You are limiting yourself to the issue [43] whether or not the decedent was bitten by the tick and whether the tick was infected, and whether there is liability under the policy.

Mr. Friedman: Yes. I think the sole issue is whether this man died by accidental means, and as to all the preliminary proof as to the issuance of the policy and compliance with its provisions, I do not think we have to waste time going into. The policies are set out in the answer.

Mr. Taaffe: The premiums were paid; you will agree to that?

Mr. Friedman: Yes, so far as I am concerned.

Mr. Mackey: Yes, we will agree that the policy was duly issued and in force with premiums paid. I regret somewhat I am not in a position to admit

that due proof of loss has been furnished with respect to death by accidental means.

The Court: Was the ordinary insurance paid?

Mr. Taaffe: Yes, your Honor.

Mr. Mackey: \$20,000 in both cases.

Mr. Taaffe: When you say you regret, Mr. Mackey—if your Honor will pardon me—that you can't concede or stipulate that due proof of death was given, I take it you were directing your remark only to proof of death within the double indemnity provisions; is that correct?

Mr. Mackey: Yes. I intended to express myself that way.

Mr. Taaffe: It is conceded or stipulated that proof of death was given?

Mr. Mackey: That is right.

Mr. Taaffe: And that those proofs of death contended that he died as a result of a tick bite; that is correct, isn't it?

Mr. Mackey: I do not think I can concede that.

The Court: Isn't that a matter of writing? [44]

Mr. Rothert: Yes, it is attached to our answer, your Honor.

The Court: Let us not waste time on technicalities. Does the proof of claim set forth what Mr. Taaffe said?

Mr. Mackey: As I recall, a photostatic copy of the proof of claim is set forth in the answer and states he died of virus pneumonia, and there is some statement to the——

The Court: Were you given notice that there

was some claim of a tick bite being responsible for this?

Mr. Mackey: The proof is made, your Honor, on a form, which at 6(a) commences with the following question: "What was the immediate cause of death?" and the answer given by the beneficiary was: "Acute bronchial pneumonia."

Now, at a later question, in answer to the following specific question: "Was death due to suicide, homicide or accident?" the answer is: "Unknown."

Mr. Taaffe: The word "accident" is underlined there, isn't it?

Mr. Mackey: Yes.

Mr. Taaffe: "If due to accident, describe the same fully." The answer to that question was: "Was bitten by a wood tick about 5/31/42 in an area that has reported Rocky Mountain spotted fever." That is the full extent of the notice.

The Court: The proof of claim is attached to the answer?

Mr. Taaffe: Yes.

The Court: And may be considered in evidence?

Mr. Taaffe: Yes, your Honor.

Mr. Mackey: Yes, it may.

Mr. Taaffe: Then, in addition to that, one more aspect of that—if we may be pardoned—it will clear up and [45] shorten matters—I take it both insurance companies will concede and stipulate that the plaintiffs in these cases consented to an autopsy being performed upon the body of the

deceased for the purpose of ascertaining the cause of death; that is correct, isn't it?

Mr. Mackey: That is correct.

Mr. Friedman: That is correct, and that the autopsy was performed, and that both the beneficiary and the insurance companies had their own medical representatives there; is that correct?

Mr. Taaffe: That is correct.

The Court: I guess you can go ahead, Mr. Taaffe, with the testimony.

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### LOUIS NAVE

called for the plaintiffs; sworn.

The Clerk: Please state your full name to the Court.

A. Louis Nave.

### Direct Examination

Mr. Taaffe: Q. Your name in full is Louis Nave? A. Yes.

Q. Where do you reside, Mr. Nave?

A. Novato.

Q. Novato, Marin County, California?

A. Yes.

Q. What is your occupation?

A. Garage owner.

Q. Your garage is located at Novato?

A. Yes.

Q. How old are you, Mr. Nave?

A. Fifty-two.

(Testimony of Louis Nave.)

Q. You are a man of family? A. Yes.

Q. Did you know Dr. Arthur Barr in his lifetime? A. Yes, I did.

Q. Do you know what his occupation was?

A. A dentist.

Q. How long had you known Arthur Barr prior to his death? [46]

A. Close to forty years.

Q. How old was Mr. Barr?

A. Pretty close to my age.

Q. You were both about the same age?

A. Yes.

Q. How well did you know Arthur Barr during that forty years?

A. Well, I knew him well enough that we went hunting pretty near every week and fishing all those years.

Q. Did you visit his home often?

A. Yes, quite often.

Q. He visited your home often, is that correct?

A. Yes.

Q. You knew all members of his family?

A. Yes, I did.

Q. You knew his brothers and sisters?

A. Yes.

Q. His mother and father? A. Yes.

Q. And he knew all members of your family?

A. Yes.

Q. Visited at your home frequently, is that correct? A. Yes.

(Testimony of Louis Nave.)

Q. Now, throughout the forty years, you have testified that you went hunting or fishing with him every week. Was he an addict of outdoor pastimes such as hunting and fishing?

A. You mean if he went hunting and fishing?

Q. Yes.

A. He practically lived in the woods.

Q. He practically lived in the woods?

A. Yes.

Q. For how long?

A. As long as I had known him.

Q. Were you a member of any hunting club with him?      A. Yes.

Q. What hunting club was that?

A. Lomalta Gun Club.

Q. Lomalta?      A. Yes.

Q. Where were the headquarters of that club located?      A. Lucas Valley.

Q. In Marin County?      A. Yes.

Q. For how long had you hunted with Mr. Barr in Lucas Valley in Marin County?

A. I would say about forty years.

Q. Did you hunt with him in other places besides Marin County?

A. Yes, we took trips. We hunted up at his brother's ranch in [47] Humboldt County; hunted up in Lassen County; Nevada; we went up in Idaho—different places.

Q. Did you fish with him frequently also?

A. Yes, we always fished.

Q. Where did you fish with him?



(Testimony of Louis Nave.)

A. Oh, we fished up in Humboldt, up the coast, for steelhead, bass fishing—wherever we found out there was any fishing, we would go.

Q. How frequently during the year would you hunt and fish with him? A. What?

Q. How often during the year would you hunt and fish with him?

A. Practically all the year round, when the season—even in the wintertime when there was nothing doing, we hunted varmints and coyotes.

Q. When you speak about hunting in the various localities and States you have mentioned, did you mean for the most part your hunting was confined to deer hunting? A. Yes.

Q. Did you also go duck hunting with him?

A. Yes, we have gone to the club.

Q. Where was the duck hunting club located?

A. We had several ones. We hunted for a good many years on the Foster property up at Bearfield. It is around Schellville, between Schellville and Reclamation.

Q. Did you hunt ducks in other regions with him?

A. Before he passed away we hunted ducks over at Grizzly Island.

Q. Did you also quail hunt with him?

A. Yes.

Q. Where did you quail hunt with him?

A. We hunted in the valley, up the coast around Marshall.



(Testimony of Louis Nave.)

Q. In Marin County?

A. Yes, mostly Marin County.

Q. Did you have an opportunity—answer this question yes or no—of observing his physical condition throughout the years [48] that you knew him?      A. Yes.

Q. What was his physical condition?

A. Well, it was good so far as I knew.

Q. Was the deer hunting strenuous?

A. Yes, sometimes. You have to walk.

Q. Was he able to engage in such strenuous hunting as deer hunting without discomfort?

A. I will say he was a good walker.

Q. He was a good walker?      A. Yes.

Q. Did he ever go in the brush? How was he in the brush?      A. Good.

Q. The quail hunting was likewise done——

A. That was all walking.

Q. All walking?      A. Yes.

Q. Did your deer hunting involve riding horse-back quite a bit also?

A. Later years we had horses. We always used to walk before.

Q. Your coyote and varmint hunting involved riding or walking?      A. All walking.

Q. How many miles a day would you cover in your coyote and varmint hunting?

A. It all depends. Coyote sometimes eight or ten miles.

Q. Over hills?      A. Yes.

(Testimony of Louis Nave.)

Q. Did Arthur Barr ever complain in your presence about being ill or unhealthy?

A. No.

Q. Was he, as far as you could observe, a strong, healthy physical specimen? A. Yes.

Q. What was his muscular development? Was it good or ordinary?

A. Oh, yes, he was a well built man.

Q. What is that?

A. He was a well built man.

Q. How about his muscular development?

A. Good. [49]

Q. Did you go on a hunting trip with him in the latter part of May 1942?

A. Yes, we were lucky to get a permit to go antelope hunting.

The Court: Would you speak up a little louder?

Mr. Taaffe: I do not think there will be any objecting to my leading the witness in this regard.

Q. The antelope season opened for the first time in California in 1942? A. Yes.

Q. And you made application for antelope permits, is that correct? A. Yes.

Q. And there were many more applications than there were permits, is that true?

Mr. Friedman: I do not think there is any question that they went antelope hunting, Mr. Taaffe. The fact that he was permitted by the Fish and Game Commission to go has nothing to do with the issues.

(Testimony of Louis Nave.)

Mr. Taaffe: There is no contention that they did not go antelope hunting in this vicinity?

Mr. Friedman: As far as I know they went hunting. Whether it was antelope makes little difference.

Mr. Taaffe: The antelope are confined only to certain areas in California, Mr. Friedman.

Q. Where did you go hunting with Mr. Barr?

A. Went up to Lassen County, up in the far northeast corner of Modoc and the Nevada line, a place called Cold Springs.

Q. Called what? A. Cold Springs.

Q. When you speak about the place known as Cold Springs, there is no community or town by that name? A. No, just the country.

Q. There is just a cold spring there?

A. Yes, the country. [50]

Q. What is the nearest town to the vicinity in which you were hunting? A. Ravendale.

Q. Ravendale is how far away from the place where you were hunting?

A. It is about twenty-two miles.

Q. Were you hunting on a ranch, or did you have your headquarters on a ranch that had any name or identification?

A. Yes, we hunted on the Davis ranch.

Q. Davis? A. Yes.

Q. The Claude Davis ranch? A. Yes.

Q. You spoke about the area or locality being in the northeast corner of Lassen County; is that correct? A. Yes.

(Testimony of Louis Nave.)

Q. How far from the Nevada border, approximately? A. Oh, around ten or twelve miles.

Q. And how far from the Modoc border?

A. About the same.

Q. Do you know what the altitude is in that vicinity?

A. Oh, I think it is around about five or six thousand.

Q. Will you describe the country there, what type of flora—that means what type of brush predominates in the country.

A. Oh, it is like all that country up there. It is all sagebrush, juniper, stuff like that.

Q. The sagebrush, of course, being a brush, the juniper being a tree; is that correct?

A. Yes, a scrub tree.

Q. It is desert country, in other words?

A. Yes.

Q. Did you hunt on horseback or afoot in that vicinity? A. Horesback.

Q. Will you state what type of wild animals inhabit that country?

A. Deer, antelope, and coyote is about all there is around there.

Q. What type of domestic animals, if any, range in that country?

A. Oh, horses, cattle, and some sheep.

Q. Is it typical desert cattle range?

A. Yes. [51]

Q. Was anybody else with you on that antelope hunting trip?

(Testimony of Louis Nave.)

A. Yes; his brother, William Barr.

Q. William Barr? A. Yes.

Q. Where did you make your headquarters and of what did those headquarters consist while you were in Lassen County on that hunting trip?

A. Where we slept out?

Q. Yes.

A. We have a cabin there on the Davis ranch where we stayed.

Q. How was that cabin equipped?

A. Oh, it is a new cabin built about four or five years. He built it for us especially. It has a stove in it, table, and beds to sleep in.

Q. Do you remember the day that you left to go on that antelope hunting trip, what day it was?

A. Yes, I think it was the afternoon of the 26th, I think it was; we went to Reno and stayed there, and we left the next day to go to the ranch.

Q. And when you say the 26th, do you mean of May 1942? A. Yes.

Q. How far is Ravendale generally or approximately from San Francisco?

A. Oh, I don't know. It generally takes about nine hours' driving—eight or nine hours' driving. I imagine around 350 miles, 375, something like that.

Q. According to your testimony, then, you would have arrived at the Davis ranch on the 27th of May, 1942? A. Yes.

Q. When did the antelope season open?

A. The 28th.

(Testimony of Louis Nave.)

Q. Of May. A. Yes.

Q. Did you hunt on the 28th?

A. Yes, we hunted on the 28th, 29th and 30th.

Q. Now, do you know, Mr. Nave, whether that country does or does not have any ticks?

A. No; in the fall when we were up there hunting, there was ticks in the deer. [52]

Mr. Friedman: May I have the answer read? I can't hear the witness.

The Court: Will you try to speak up a little louder?

The Witness: I said the deer in the fall had ticks on it and I paid no attention to it.

Mr. Taaffe: Q. How long had you been hunting up in that country with Mr. Barr?

A. About ten years.

Q. You had seen ticks on the deer in the fall that year, is that correct? A. Yes.

Q. Let me ask you this question: When does the deer season open in that vicinity.

A. It generally opens about the 16th of September.

Q. The antelope season, however, opened on the 28th of May, is that right? A. That year, yes.

Q. Are there numerous ticks or are there just small numbers of ticks in that country?

Mr. Friedman: I think that calls pretty well for the witness' conclusion. I will object on that ground.

Mr. Taaffe: Q. How many ticks have you no-



(Testimony of Louis Nave.)

ticed, or just state the condition of infestation of animals such as deer that you have seen up there with ticks.

A. Oh, I don't know. I never paid no attention to those things. See ticks on deer all the time. I know there is ticks on them; that is all. I never found out how many was on them.

Q. By the way, you have hunted, according to your testimony, for forty years in Marin County. Have you ever seen or heard or known or observed a case where any ticks in Marin County ever made anybody sick?

A. No, I had lots of them stuck in me, and everything else, but haven't paid any attention to them. [53]

Q. Have you taken lots of ticks off yourself in Marin County? A. Yes, lots of them.

Q. All through the forty years?

A. Yes.

Q. Have you seen Dr. Barr take ticks off of himself for forty years, Marin County ticks?

A. Yes.

Q. Have you seen numerous other persons take the Marin County ticks off of them?

A. Most everybody that hunts.

Q. Do you know whether the antelope in Lassen County carry ticks? A. Yes.

Q. Do you know whether the horses and dogs in that country carry ticks?

A. I never paid any attention. I never had any

(Testimony of Louis Nave.)

attention. I never had any occasion to notice whether they had any or not.

Q. Have you seen ticks on humans in the fall of the year up there in the deer season?

A. Well, yes, sometimes. They have ticks up there, too.

Q. Were some antelope killed by members of the three-man party you have described on that hunting trip?

A. Yes, there was two. Dr. Barr killed one and I killed one. Had only two permits.

Q. And you brought those antelope home?

A. Yes.

Q. You reported them to the Fish and Game Commission, is that correct? A. Yes.

Q. When those antelope were killed how were they handled? What was done with them first, how were they brought into camp, and so on?

A. Put on a horse.

Q. Before they were put on a horse was anything done?

A. Oh, yes, the insides taken out, dressed.

Q. Did Arthur Barr clean either of those antelope out?

A. Yes, he and his brother worked together on one, and me and another, a cowboy, were together on the other one. [54]

Mr. Friedman: I haven't the slightest idea what the witness said.

The Court: Can't you speak up?

(Testimony of Louis Nave.)

The Witness: I said Dr. Barr and his brother were present when Dr. Barr killed the deer, and Dr. Barr handled one——

Mr. Taaffe: Q. When you say “deer” you mean antelope?

A. Antelope—and a cowboy and myself handled the one I killed.

Q. Who was the cowboy present on that occasion? A. Norman——

Q. Norman Custed? A. Yes.

Q. A nephew of Mr. Davis, who owned the Davis ranch up there? A. Yes—yes.

Q. When the antelope was drawn, cleaned out—that is, the intestines taken out—that is what you mean by that? A. Yes.

Q. When that was done, how was the antelope handled?

A. We strapped him onto a horse and brought him into camp.

Q. Do you remember whether Dr. Barr led his horse into camp with the antelope on the horse?

A. No, walked.

Q. Walked in? A. Yes.

Q. How were the antelope brought back to Marin County from Lassen County?

A. Well, put it on my truck and brought him into Reno and put him in the ice house over night.

Q. And then taken from the ice house and brought back on the same truck? A. Yes.

Q. The following day. Now, did Dr. Barr, his

(Testimony of Louis Nave.)

brother William Barr, and yourself all ride in the same truck?

A. Yes, on one truck.

Q. A pickup truck, is that correct?

A. Yes.

Q. On what day did you finish hunting in Lassen County on that [55] occasion?

A. What day we hunted?

Q. What day did you finish hunting?

A. It was on Sunday the 30th.

Mr. Taaffe: May I interrupt at this time to inquire if Dr. Briggs is here?

The Court: Yes.

Mr. Taaffe: Might I have the witness step down?

The Court: You are excused for the present.

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### LEROY H. BRIGGS

called for the plaintiffs; sworn.

The Clerk: Please state your full name to the Court.

A. Leroy H. Briggs.

#### Direct Examination

Mr. Taaffe: Q. Where do you reside, Dr. Briggs? A. Residence or office?

Q. Residence.

A. The residence is No. 2365 Broderick Street, San Francisco.

Q. Your office is located where?

(Testimony of Leroy H. Briggs.)

A. 384 Post, the Fitzhugh Building.

Q. What is your occupation?

A. I am a physician.

Q. Entitled to practice your profession in the State of California?           A. Yes.

Q. Continuously for how many years, Doctor?

A. Since 1908.

Mr. Taaffe: I take it that Dr. Briggs' qualifications will be stipulated to?

Mr. Friedman: As a——

Mr. Taaffe: As a physician and surgeon.

Mr. Friedman: As a physician and surgeon, yes.

Mr. Taaffe: Q. Doctor, did you know Dr. Arthur Barr in [56] his lifetime?

A. Not until I met him professionally.

Q. When did you first meet him professionally?

A. On the 2nd of June, 1942. I am referring to my records taken at that time.

Q. Had you treated other members of his family professionally prior to that time?

A. I had seen Mrs. Barr previously.

Q. Will you state, Doctor, the circumstances under which you first saw Dr. Arthur Barr on June 2, 1942?

A. Dr. Barr came to me that day.

Q. To your office?

A. To my office, by appointment, stating that he had recently returned from a hunting trip and he wanted to be looked over. Apparently he was somewhat concerned about the fear of heart disease. He had told me that he had driven up to Lassen County and had some pain in the back on the way up, had

(Testimony of Leroy H. Briggs.)

hunted through that country for a number of days, and had come down.

Q. When you say "come down," you mean returned to his home?

A. Returned, yes. He had been in his office, I think, one day—this happened to be a Tuesday, the 2nd of June, as I recall—and he had no symptoms whatever owing to any illness. I thought the backache he had was due to back strain from the long ride, and on examination he was found normal in all particulars, and I told him he was perfectly healthy as far as we could tell; that any man who could do what he had done the previous ten days need not fear about his heart trouble.

Q. Did you take his temperature?

A. I did. It was normal—98.2 degrees.

Q. Did you make an examination?

A. I examined him from head to foot.

Q. How long would you say your examination took? [57]

A. An examination of that sort takes an hour. My secretary always allows an hour for a new patient.

Q. Did you examine his circulatory system at that time? A. I did.

Q. What did you find concerning that?

A. Not a thing. His heart was normal in all particulars. His blood pressure was perfectly normal. His arteries were soft.

Q. Did you have him disrobe in whole or in part, Doctor, for purposes of that examination?



(Testimony of Leroy H. Briggs.)

A. In whole, with the exception of his shoes. He left his shoes and socks on.

Q. Will you state what his physical development was as you observed at that time?

A. The note I made is that he was a healthy looking man, flushed face from exposure to sun, well nourished and developed.

Q. Are there any notes that you have before you of any significance, Doctor?

A. Not of any significance at all. He had told me that he thought he was allergic to various things and that he got rashes very easily, but there was nothing at all on his skin.

Q. You observed his skin for the purpose of determining whether there was any rash?

A. Yes; I have a note here that other than for the suntan, his skin was otherwise negative.

Q. By the way, Doctor, do you know whether dentists who are in the habit of using novocaine get novocaine rashes on occasion?

A. Well, I do not see how they could very well, because their fingers do not come in contact with novocaine. They suck the novocaine up in a syringe.

Q. Do they get itches from novocaine?

A. That I can't say, because, as I say, novocaine as used by a dentist or surgeon is handled through the medium of instruments, hypodermic [58] syringes.

(Testimony of Leroy H. Briggs.)

Q. Would you say from your observation, your examination, that he was a strong-appearing man, well muscled, well developed? A. Yes.

Q. As far as you were able to observe, perfectly healthy, is that correct?

A. He was perfectly well, and I so reassured him.

Q. Doctor, you stated that you examined him on a Tuesday; is that correct?

A. On June 2. When I looked up the calendar, it was on a Tuesday.

Q. You know now he was dead the following Saturday morning at four a.m.?

A. I know now. I happened to go East to a meeting, and on my return I found his record on my desk. I have a very alert secretary, and she had made some notes that on June 4 his wife telephoned to report he was quite ill with a temperature of 103, and wondered if anything was found in his examination—this is quoted—

Mr. Mackey: Could I interrupt to ask what date it was his wife phoned that his temperature was 103?

The Witness: My secretary has dated this June 4. I have no personal knowledge of that at all, as I was on the way East.

Mr. Mackey: Is the hour noted by your secretary?

The Witness: No. She was in from ten until the afternoon.

Mr. Taaffe: Q. I can tell you it was sometime

(Testimony of Leroy H. Briggs.)

in the morning after Dr. Marston visited the home, if that will help you.

Doctor, knowing now that he was perfectly healthy on Tuesday—I will withdraw the question.

What time on Tuesday did you examine him, morning or [59] afternoon?      A. Afternoon.

Q. Knowing that he was perfectly healthy on Tuesday afternoon and that he was dead Saturday morning, it is possible, Doctor, for a person to be perfectly healthy and still be in the incubation stage of some disease on Tuesday?

A. He could be healthy so far as any ill sign went. A man could be in an incubation period of pneumonia, say, or any of the acute infections, and if he had a normal temperature there would be no way by which you could tell. He had no specific complaints except this bachache which he had, which is a very frequent sign of infection, and which he had had some ten days before.

Q. He had had some ten days before?

A. Yes, on his way up.

Q. The fact is that he had gone to Lassen County on the 26th of May, according to his testimony, which would be about seven or eight days before; is that correct?

Mr. Mackey: Six or seven days. I think the correct date is the 27th.

Mr. Taaffe: No, they left on the 26th, arrived on the 27th, and began hunting on the 28th. That is the testimony.

(Testimony of Leroy H. Briggs.)

Q. Doctor, what do you mean by the incubation stages of a specific infection?

A. By a specific infection we mean an infection that is due to a definitely known cause, like the typhoid bacillus or the pneumococcus or one of the virus diseases. There is usually a period of varying length from the time the individual gets the noxious agent of pneumococcus or the typhoid bacillus—the particular virus—until the time that it becomes in sufficient quantity to give a person symptoms.

Q. Let me ask you this: If a person, by way of example, were suffering from an infection from a tick, such as Rocky Mountain [60] spotted fever, typhus, tularemia, or any one of the things that a tick can communicate, any of the rickettsial diseases, as a result of a transmission from a tick bite, on Sunday preceding your examination, could it be possibly medically, in your opinion, Doctor—

Mr. Friedman: If the Court please, we would like to object on the ground no foundation has been laid.

Mr. Taaffe: This will be connected up later.

The Court: He has not finished the question.

Mr. Taaffe: Q. Doctor, could a person who had been bitten by a tick, we will say, on the Sunday previous to your examination, a tick carrying a rickettsial-microorganism, be found by you or any doctor to be apparently healthy on the following Tuesday?

A. Of course, I am not qualified as an expert.

(Testimony of Leroy H. Briggs.)

Mr. Friedman: Pardon me. I desire to object on the ground——

The Court: I do not think it is necessary. The witness has said he could not qualify as an expert.

Mr. Friedman: I did not hear the answer. The acoustics are bad or my ears are bad.

The Court: It is difficult to get the witnesses to speak up. They seem to be afraid of this room.

Mr. Taaffe: Q. Let me put it this way; it will be all-inclusive then——

A. I am perfectly willing to answer that question if the Court and the opposing attorney would give me permission.

Mr. Friedman: Mr. Taaffe, isn't it a matter the Court will take judicial knowledge of that a person could have some sort of a disease and still a doctor won't know until a certain stage has been reached? That is a matter of common [61] science. I do not think you have to prove that.

Mr. Taaffe: If that is conceded, that is perfectly all right.

The Court: I think we can agree on that, can't we?

Mr. Friedman: As a general proposition that is true.

Q. As a matter of fact—may I interrupt, Doctor?—that is true of a common cold, isn't it?

A. Yes. It is true of practically all infections.

Mr. Taaffe: Q. May I see your notes, Doctor, for a moment? I think I have finished with you. I notice here, Doctor, a note to the effect that Dr.



(Testimony of Leroy H. Briggs.)

Barr at the time of the examination had the ordinary exanthema.

A. "Exanthema" means measles, chicken pox, and children's diseases. By "ordinary" we mean the milder ones. If he had had scarlet fever or diphtheria they would have been mentioned.

Q. You mean he had those——

A. In childhood.

Q. Concerning his habits you have noted that he was a good sleeper, according to the history of himself as he related it; is that correct?

A. That is correct.

Q. You have likewise noted that his digestion was perfectly normal except that occasionally certain foods gave him hives; is that right?

A. That was his statement, yes.

Q. You have noted also that his bowels moved fairly well but tended to be a little loose; is that correct?

A. If it is down there, those were the statements he gave me.

Q. You have also that he takes very little alcohol and no tobacco at all; is that the history he gave you?

A. That is the history he gave me.

Q. You have noted his weight to be around 180 pounds; is that correct?

A. If the record so states. [62]

Q. I take it that probably was the result of observation as well as case history?

A. I weighed him.



(Testimony of Leroy H. Briggs.)

Q. You weighed him?

A. I weighed him and his height was taken.

Q. Do you remember what his height was, Doctor?

A. It is on the record. It will follow his weight.

Q. Five feet nine.

A. That is with shoes.

Q. You have noted here that he came in for a going over— "Comes in for a going over." Is that what he told you as the reason for his presence?

A. Yes, that is the way he expressed the idea, that he had come in for a complete examination.

Q. You have also noted that he does a good deal of outdoor activity without the slightest symptoms.

A. By that I mean the heart symptoms. He wanted to make sure that his heart was all right.

Q. He did not say it had ever given him any trouble of any kind?

A. No, and in questioning him he had no shortness of breath and he had no pain in his chest or down his arm. He just had a severe hunting trip, and without any of those symptoms, naturally, I was reassured that his heart was sound.

Q. You have also noted that he was a healthy looking man and that is a fact, isn't it?

A. That is true; that is a fact.

Q. By the way, you have another note here that he was five feet nine inches tall and his weight 187 pounds. I take it 187 was noted from the actual weighing of him, is that correct?

(Testimony of Leroy H. Briggs.)

A. Yes; that is fully dressed. We allow ten pounds for a man's clothes.

Q. You found his pupils to be regular, equal, and react promptly to "l" and "a".

A. To light and accommodation. [63]

Q. His fundal arteries, you have noted, show no arteriosclerosis; that is a fact, isn't it?

A. That is a fact.

Q. What does that indicate, Doctor?

A. By the fundal arteries we mean the arteries that are on the retina, on the back of the eye. It is customary in diagnosis to look at the back of the eye because those arteries in back of the eye are a pretty fair index of the arteries of the brain.

Q. You have a note that his throat was red, his tonsils were in, and his tongue clean. Those are the facts as you know them, is that correct?

A. Those notes were dictated immediately after the examination.

Q. You then have a note that his neck was quite negative.

A. By that I meant that there were no enlarged glands, no scars; his thyroid was not felt.

Q. You next have a note that his heart and lungs were normal in all particulars, is that correct?

A. It is. I write it that way to avoid length of time in going into the details of it. The examination was made in considerable detail.

Q. What did you do, Doctor, for the purpose of determining that his lungs were normal?

(Testimony of Leroy H. Briggs.)

A. The technique of the examination of the lungs is to look at a man's chest, watch the movements on respiration, elicit what we call fremitus pertussit to see if his lungs are full of air, and then to listen with a stethoscope, and provided any two of those maneuvers show no abnormality, we say the lungs are negative or normal.

Q. His heart showed no enlargement, according to your notes here?      A. Correct.

Q. His blood pressure was 140 over 100; is that correct?      A. Correct.

Q. Perfectly normal for him?

A. At 51 years his diastolic [64] of 100 is a trifle high, but not considered abnormal.

Q. Hemoglobin was 95 per cent, is that correct?

A. That is the red coloring matter of the blood.

Q. Of what is that negative, Doctor?

A. The man does not have anemia.

Q. Who took his hemoglobin?      A. I did.

Q. What did you do for the purpose of ascertaining that hemoglobin?

A. The instrument I use is known as the Dare instrument. You prick the man's ear and collect an amount of blood in a pipette and that is compared with a color scale that reads in percentage of normal.

Q. What is the significance of a hemoglobin of 95 per cent?

A. A man with a hemoglobin of 95 per cent, as I say, is not anemic, and as far as his blood is concerned, is reasonably healthy, supposedly.

(Testimony of Leroy H. Briggs.)

Q. In connection with his urine, you have the note, "No sugar, no albumen, microscopical, negative." Are those the facts?

A. Those are the facts. In other words, a normal urine.

Mr. Taffe: I think that is all, Doctor.

The Court: Any questions, counsel?

### Cross Examination

Mr. Mackey: Q. Dr. Briggs, I take it when you stripped this man you examined the periphery of his body pretty carefully, did you?

A. Yes, sir.

Q. Did you notice the condition of his skin?

A. As I stated, his skin was normal except for the sunburn of his face.

Q. And by that you mean there was no evidence of any macular rash, petechial rash, or a rash of any kind?

A. The only mark was a scar of an abdominal operation that he [65] had had some fifteen years before.

Q. Did you examine the skin in the vicinity of the navel?

A. Yes, as I examined his body I would have noticed if there was anything out of the way there. I saw nothing of note.

Q. Did he make any complaint of having been bitten in that area by a tick?

A. No, he did not.

Q. Did he make any complaint to you about hav-

(Testimony of Leroy H. Briggs.)

ing suffered from a rash on his wrists and arms while on this hunting trip?      A. He did not.

Q. Have you ever seen a tick bite or lesion that is left by a wood tick?      A. Yes.

Q. Did you see anything that was in the nature of such a lesion on his body?      A. No.

Q. In the vicinity of the navel or elsewhere?

A. No.

Q. Did you see anything in the nature of a lesion or a blemish of any kind in the deltoid area of this man?      A. Not that I noticed.

Q. You examined his skin carefully on all parts of his body?

A. Yes, the man was stripped. I looked him over, and I think if anything of note had been there I would have seen it.

Q. Am I correct in saying that after he described the activities of his hunting trip you made some such remark to him, "Well, after such a strenuous time you ought to feel sort of bad," is that correct? I know I have not used your exact language.

A. I don't recall it. I might have said that in relation to his backache, of which he had complained—a long automobile trip in a modern car is conducive to a certain amount of back strain.

Q. Did I understand you to say correctly that that backache is a possible evidence of infection?

A. It can be. [66]

Q. That he might have had some infection at that time?



(Testimony of Leroy H. Briggs.)

A. No, I think I can say positively no, because he had enough infection in his system—let us say a week before—to give him a backache, he would have had a fever at the time I examined him.

Q. I note you in your report state that his throat was red. What did you mean by that remark?

A. That it was a little deeper color than the normal pink of the throat. It did not impress me particularly at the time. We see it frequently in men who are smokers. Dr. Barr is not a smoker.

Q. Do you also see that frequently with people who are suffering from colds or bronchitis?

A. Yes.

Q. You spoke somewhat on direct examination in some diseases—and I think you said particularly pneumonias—that at times a condition of infection may precede the existence of any clinical signs?

A. Yes, I think that is true of nearly every infection. It is what we speak of as the incubation period.

Q. Did you state generally of infections that the incubation period is of some uniform duration?

A. Not uniform. I did not specify as to any length of time.

Q. Could you specify the usual incubation period of diseases generally?

A. Of the ordinary diseases, I would say any time from a day to a month.

Q. From a day to a month? A. Yes.

Q. Isn't it true, Doctor, that in virus pneumonias the picture of the chest disclosed by X-ray is



(Testimony of Leroy H. Briggs.)

far in advance of any symptoms that are shown externally by the patient or shown on examination with a stethoscope?

A. As you put the question my answer would be no. I think what you are trying to get [67] at, if the Court will permit, is that the picture given by the X-ray is more marked than the signs that are elicited in the examination of the chest. That is what you mean, I think. Signs are before every symptom.

Q. Isn't it common in cases of virus pneumonias that at the time you would get a picture of a chest condition you would be unable to hear any rales in the chest by such examination as you made?

A. In the first place, the man would not have had a normal temperature had he had a virus pneumonia.

Q. In other words, does a man with a virus pneumonia have an abnormal temperature during the incubation period?

A. He does not have a pneumonia in the incubation period.

Q. I take it you are of the opinion that a man could not have a chest condition demonstrable by X-ray without having a temperature at the same time?

A. He would not have a pneumonia under ordinary circumstances that would give him the X-ray picture of a pneumonia without having a fever.

Q. What is the pathology of a virus pneumonia?

A. Here again I am not sitting as an expert. I have not been qualified as an expert.

(Testimony of Leroy H. Briggs.)

The Court: I think that is right. I do not think counsel have the right, unless they employ the witness as an expert, to have him testify on expert subjects.

The Witness: It is a common tendency of attorneys, I have found, to do that—to get something for nothing.

Mr. Mackey: I did not intend to use the doctor any further in connection with his answers on direct examination, and he did speak about signs during the incubation period.

The Court: Just to a limited extent.

The Witness: I might say in explanation that there is a [68] difference between signs and symptoms. Symptoms are subjective and signs are objective.

Mr. Mackay: Q. The fact is, Doctor, that he had no rash?

A. Not that I discovered.

Q. Did you by any chance manipulate his skin or press it?

A. I felt the skin of his chest, the skin of his abdomen, and I felt the skin of his back, his genitals. You do that on examination.

Q. On applying pressure you saw no discoloration of any kind? A. No.

Q. Indicating anything abnormal in the area of the skin of his body? A. No.

Mr. Mackay: I think that is all.

Mr. Friedman: I have no questions.

Mr. Taaffe: That is all. Thank you, Doctor.

LOUIS NAVE

resumed.

Direct Examination

(Continued)

Mr. Taaffe: Q. I believe you have testified, Mr. Nave, that your actual hunting ended on June 30, is that correct, or, rather, May 30—is that correct?

A. Yes.

Q. 1942. Did you stay at the cabin at the Davis ranch until the morning of May 31?

A. Yes, we left in the morning for Reno.

Q. About what time did you leave the Davis ranch on May 31? A. Oh, about eight o'clock.

Q. In the morning? A. Yes.

Q. Where did you go when you left the ranch?

A. We went to Reno.

Q. And when you arrived in Reno what did you do? [69] A. We went to an auto camp.

Q. All three of you? A. Yes.

Q. And when you arrived at the auto camp what did you do?

A. We left the trailer there—I mean our stuff there—guns and stuff, and took the antelope over to the ice house.

Q. And returned to the auto camp?

A. Yes.

Q. When you got to the auto camp what did you next do?

A. We took—I went in and took a shave and took a shower, and I came back and put my clothes on. As I was putting my clothes on, why, a couple of ticks fell off.

(Testimony of Louis Nave.)

Q. By the way, how many rooms did you have, that is, did the party of three have, at the auto camp? A. Two rooms.

Q. Were those rooms adjoining each other?

A. Yes, just a door between.

Q. Was there a doorway between them?

A. Yes.

Q. How many beds were there in the two rooms?

A. Two double beds.

Q. Did William Barr occupy one of those rooms? A. Yes.

Q. Dr. Arthur Barr and you occupied the other room, is that right? A. Yes, we slept together.

Q. What kind of beds were in those rooms?

The Court: He said double beds.

Mr. Taaffe: Q. Was there only a single double bed in each room?

The Court: He said he and the doctor slept together. He did not speak up loudly. (To the witness): Won't you try to speak up louder?

The Witness: Yes.

Mr. Taaffe: Q. When you were putting on your clothes you saw two ticks fall off, is that true?

A. Yes. [70]

Q. To the floor? A. Yes.

Q. Did you notice those ticks particularly so you can describe them?

A. Yes. They are funny looking bugs. They looked like a ladybug. They got white spots on them.

(Testimony of Louis Nave.)

Mr. Friedman: Will you speak a little slower? They looked like what?

The Court: A ladybug, with white spots on them.

Mr. Taaffe: Q. Those bugs, so far as you know, did not bite you? A. No.

Q. What did Arthur Barr do after you had taken your shower?

A. Well, he said, after I told him about the ticks, "Well, I had better take a shower, too. Maybe I have some on me."

Q. Then what happened?

A. Then he took a shower, and when he was in the shower he said, "I have two of them, too. I have one stuck just above my navel."

Mr. Friedman: Just a moment. May I have that answer?

(Answer read.)

Mr. Friedman: I will ask temporarily that the latter part of this answer go out as to what Dr. Barr said as not responsive to the question. The question was, "What did you do then?"

The Court: The question was, "What happened?" Is that right?

Mr. Friedman: Well, what happened.

Mr. Taaffe: That objection that it is not responsive, as I understand the rule of evidence, is not good, if the answer be otherwise material. Of course, this answer is material.

Mr. Friedman: I will amplify my objection and move to strike out the latter part of the answer

(Testimony of Louis Nave.)

on the ground that the statement of Dr. Barr is self-serving.

Mr. Taaffe: In reply to that, if it please your Honor, [71] wherever a declaration of an individual concerning his condition, or what amounts now to a condition, although he did not know it at the time, and the physical condition involved is at issue, recitals of what he said are evidence and are admissible. The mere fact that it was said not to a doctor does not make the slightest difference.

Mr. Friedman: I am not sure it is admissible if it is said to a doctor.

Mr. Taaffe: If it is said to a doctor and the issue is his then present condition, it is admissible. I have never heard that point contested. Now, here we have a statement, "I have ticks on me." While he does not know at that time that a fatal disease is coming on him, yet it develops later that his death resulted from an infection as here presented, I submit that testimony is admissible.

The Court: Q. Did you see the tick on him?

A. Yes.

Mr. Mackey: Let the record show the same objection on behalf of the defendant Equitable Life Insurance Company and a motion to strike on the ground it is hearsay.

The Court: Your objection may be technically correct, but of what importance is it? The witness said he saw the ticks on the doctor. What the doctor said is of no importance.



(Testimony of Louis Nave.)

Mr. Friedman: May it be stricken, then, your Honor?

The Court: No, I will allow the answer to stand.

Mr. Taaffe: Q. How many ticks did you see on Dr. Barr? A. One.

Q. Where was the tick when you saw it on him?

A. It was above his navel about a half inch, as I say, something like that.

Q. Buried in the skin, you say, about a half inch above his navel? A. Yes. [72]

Q. You have seen ticks buried in yourself and in other people for the last forty years?

A. Lots of them.

The Court: You do not mean ticks were buried for forty years?

Mr. Taaffe: I mean the last forty years.

The Court: Q. You mean you saw them very often, is that it?

A. Yes.

Mr. Taaffe: Q. Did I understand you to say that you saw this tick buried for some distance, for some length of itself?

A. The length of the tick?

Q. How far was it buried in him?

A. His head was stuck in there; just his back end was sticking out—about half of him, I imagine.

Q. About half of the tick? A. Yes.

Q. Did you help Dr. Barr to extract that tick?

A. No.

Q. Did you offer to help him extract it?

(Testimony of Louis Nave.)

A. Yes, and I just kind of kidded him, "Do you want me to help you take it out?"

He said, "No."

I said, "We don't know whether he is a left-handed screw or a right-handed screw," because he was screwed in.

I went out then, and he took it out himself.

Q. Do you know, Mr. Nave, from your own personal experience of hunting for the past forty years that some ticks will embed themselves by biting into a human being and then screwing themselves by taking a right-handed turn while others take a left-hand turn? Is that what you meant?

A. Yes.

Q. Is that what you meant by your remark to him? A. Yes.

Q. Did you see Dr. Barr take that tick or extract that tick from his abdomen?

A. No, I walked out of the bathroom. He [73] said he would do it himself and I walked out.

Q. Did you see the area immediately surrounding where that tick was embedded in his abdomen?

A. Oh, I just saw the tick there, just a little red there, a little pink—right around where it went in.

Q. How big was that red or pink spot around where the tick was embedded?

A. Oh, I don't know; a half of a dime, I guess, something like that.

Q. Was it swollen to some slight extent? That is, was it raised above the level of the surrounding skin slightly?

(Testimony of Louis Nave.)

Mr. Friedman: Why not allow the witness to describe what he saw?

The Court: Yes.

Mr. Taaffe: Q. Will you describe it with reference to other particulars, that is, the vicinity where the tick had embedded itself?

A. I saw the tick embedded halfway and there was a kind of a red spot around it like they always do, and that is all I seen. I walked out.

Q. What time of day, approximately, was it, Mr. Nave?

A. Oh, around one o'clock, something like that.

Q. When you saw the tick on him?

A. Yes, one, half past one.

Q. At that time did you see him disrobed, completely disrobed?

A. He was disrobed. He was in the shower in the bathroom.

Q. Did you notice any other blemishes, rashes or anything else on him that would attract your attention at that time? A. No, nothing at all.

Q. Later on that same day did you see anything upon the body of Dr. Barr that drew your attention particularly?

A. No, nothing at all until about nine o'clock that night. We [74] went to bed and we were laying in bed and we were reading, and he said, "Look at my arms."

I looked at them, and they looked like red spots. I said, "What have you got? Measles?"

He said, "I don't know."

(Testimony of Louis Nave.)

I said, "What is it?"

"I don't know. Nervousness, I guess."

That is all that was said.

Q. Was that in the same place, in the same auto court?      A. Yes.

Q. Nine o'clock this same day when you saw the tick on him, is that correct?      A. Yes.

Q. Where were the spots that looked like measles?

A. Well, he had his underwear on. The sleeves came up to here, and I just saw his arm. It was more around his wrist than it was up here (indicating).

Q. When you say he had his underwear "to here," you have indicated you mean his underwear came across his arms at the biceps; is that it?

A. Yes, came to here.

Q. Your hand is pointing to the middle of the upper arm, is that correct?      A. Yes.

Q. That is where his underwear went?

A. Yes, up to here—just a short sleeve.

Q. When you say that there were more of these spots that looked like measles along his wrist than further up on his arm, is there some comparison you can make to show us the difference between the number of spots on his wrist and those extending along his arm?

A. No; I didn't pay much attention to that, because I didn't know what it was. I asked him, and he said it was nervousness, and all I noticed was he had more down here [75] than up the arm.

(Testimony of Louis Nave.)

Q. After you went to bed at nine o'clock that night, when did you next see Dr. Barr?

A. Well, a friend of ours came in there and he wanted us to go fishing up at Lake Tahoe, and naturally, I didn't feel well and I said, "I don't think I will get up in the morning and go fishing." And his brother isn't much of a fisherman. He said, "I wish I didn't have to go along with this fellow." And he got up at two o'clock in the morning. The fellow came and got him and they went fishing at some stream up at Lake Tahoe. And they made some arrangement.

He said, "We will meet you in Truckee. That will save us coming back into Reno, and this other fellow can come in."

So we met him pretty close to twelve o'clock in Truckee.

Q. Met Dr. Barr?                    A. Yes.

Q. He got up at two?                A. Yes.

Q. And went fishing?

A. Yes, went fishing.

Q. The next time you saw him after he got up at two in the morning was somewhere between eleven and twelve in Truckee?                A. Yes.

Q. Then what did you do?

A. Had a drink, and then we got in the car and left for home in the truck.

Q. Did he complain about being ill or not feeling well at any time on the trip home?

A. Never said a word about anything. All he said, he was going down and get his examination

(Testimony of Louis Nave.)

the next day, "on account of my having trouble about a year ago." He said, "Maybe there might be something wrong with me. I will go down and get a checkup."

Q. With the exception of saying those spots you saw might be due to nervousness, the spots that you noticed on his wrists, [76] on that trip at any time did he complain about not feeling well?

A. No, he didn't say a word on the way home.

Q. Either on the trip, on the way home, or on the way there? A. No.

Q. Had you ever heard him complain in his lifetime about being sick?

A. No, nothing out of the way that I know of.

Q. Throughout the entire forty years that you knew him had you ever known him to be sick?

A. No, never been sick that I know of.

Q. What time did you arrive in San Rafael, Marin County, upon your return here after that trip? A. Oh, about seven o'clock.

Q. Seven o'clock. Will you consider that answer again? You left Truckee somewhere around twelve o'clock, you say? A. Yes.

Q. How long does it take to drive from Truckee to San Rafael?

A. Oh, I don't know; six or seven hours if you stop to eat or something.

Q. Did you leave him off at his home in San Rafael? A. Yes.

Q. Is that the last you ever saw him alive?

A. That is the last time, yes.



(Testimony of Louis Nave.)

Q. You heard, did you, a few days after your return that he was sick? A. Yes.

Q. You offered yourself as a subject for a blood transfusion, is that correct?

A. Well, a friend of mine rung me up, the first time I knew anything about it. He said, "Stand by for a blood transfusion." Arthur was out of his head and very sick. That is the first time I knew he was sick.

Q. Did you report this episode concerning this tick as you observed it in Reno prior to his death to anybody at all?

A. Well, Mr. Grady rang me up and told me Arthur was sick, stand by, and I said, "What can be wrong with him?" [77]

Mr. Friedman: Just a moment. I am going to object to all this.

Mr. Taaffe: Q. Without giving the language or the conversation, did you report the tick episode as you observed it prior to Arthur Barr's death?

A. Yes.

Mr. Friedman: Objected to, your Honor, on the ground it is hearsay.

The Court: I will sustain the objection.

Mr. Friedman: I ask that the answer go out.

The Court: The answer may go out.

Mr. Taaffe: I think that is all.

#### Cross Examination

Mr. Friedman: Q. Let me ask you, Mr. Nave: You stated that you never knew, in the forty years

(Testimony of Louis Nave.)

you knew him, of Dr. Barr ever complaining about being ill; is that right?

A. It depends what you call ill. I know he had an operation for hernia. Of course, that could be sickness.

Q. Do you mean in all the time you have been fishing and hunting with him he has never said, "I don't feel so good today"?

A. Well, he might have had a cold or something like that.

Q. On this trip to Lassen County in May did Dr. Barr make any complaints to you on the way up about his condition? A. No.

Q. Did he tell you he had a pain in the back?

A. No.

Q. Didn't he mention he had any pains of the back at all? A. No.

Q. He never mentioned that at all to you?

A. No.

Q. And at the time you were in Lassen County did he mention the fact that his back had hurt him or was hurting him?

A. Well, I think after we rode about three days, something like that, he said, "My back is kind of tired riding in the saddle." [78]

Q. The first complaint he made to you was after he had actually been hunting and horseback riding for two or three days; that was the first time he mentioned his back? A. Yes.

Q. How many times had you and Dr. Barr been to Lassen County?

(Testimony of Louis Nave.)

A. Oh, I guess about ten years.

Q. And during those forty years of hunting throughout the State of California with Dr. Barr you had found during that period of time many ticks upon your body, had you not? A. Yes.

Q. Some of them had bitten you at times, is that correct? A. Correct.

Q. And I assume that during that period of time you know that Dr. Barr had found ticks on his body? A. Yes.

Q. And some of them had bitten him at prior times, is that correct? A. Yes.

Q. You knew when you went to Lassen County that there were ticks in Lassen County, didn't you?

A. Yes.

Q. Dr. Barr knew that, didn't he?

A. Yes.

Q. And, as you have testified, you had found ticks on deer that you had killed at times?

A. Yes.

Q. I do not know what you said about the dogs and horses. Did you hunt with dogs? A. No.

Q. You did not hunt with dogs at any time?

A. No.

Mr. Taaffe: Do you mean the Lassen trip?

Mr. Friedman: I am talking about the Lassen trip.

Q. All the years you had hunted and had ticks upon you and ticks had bitten you, you had never become ill from it, had you, from a tick bite?

A. Well, I have not badly, but—I mean where

(Testimony of Louis Nave.)

I had to go to bed or anything—but I have had sores.

Q. Outside of a sore made by the bite, you have never had any other effects made by a tick bite?

A. No. [79]

Q. And I assume that somewhere around May of last year, when you went to Lassen County, personally you did not pay much attention to ticks and tick bites, did you? A. No.

Q. That was just something that was going to happen or may happen on a hunting trip?

A. Yes.

Q. Was that Dr. Barr's attitude?

A. About the ticks?

Q. Yes.

A. We didn't talk about ticks. We always had ticks on us—never paid any attention to them.

Q. In other words, nothing unusual?

A. No.

Q. And nothing, in so far as you knew, to be afraid of? A. No.

Q. When you were in Reno and, as I understand it, in this auto camp, you were the first one to take a bath and shower? A. Yes.

Q. Was there only one shower for the two rooms? A. Yes.

Q. Just one shower for the two rooms?

A. Yes.

Q. And you occupied it first?

A. I took a shower first, yes.

(Testimony of Louis Nave.)

Q. You took a shower first. You did not see any ticks on your body? A. No.

Q. And after you took the shower you went back into the room to dress, is that right? A. Yes.

Q. And Dr. Barr then went into the bathroom?

A. Shortly after I put my clothes on.

Q. After you put your clothes on?

A. Yes, I put my clothes on, two ticks fell off, and I told him about it, and he said, "I had better get a shower, too."

Q. Wait a minute. Where was the doctor when you told him about the ticks?

A. About the ticks?

Q. Yes. A. In the bathroom. [80]

Q. That is what I say. When you came back to dress, Dr. Barr went into the bathroom?

A. Yes.

Q. And while you were dressing, these two ticks fell out of your clothes? A. Yes.

Q. Did you examine your clothes to see if there were any other ticks in them?

A. My clothes? No.

Q. After those two fell out, you did not look to see if there were any more there? A. No.

Q. But you did mention the fact that a couple of ticks fell out of your clothes? A. Yes.

Q. Although you said the fact that you got ticks on hunting trips was something you rather expected? A. What do you mean, "expected"?

Q. It is nothing unusual? A. No.

Q. It has happened to you for forty years?

A. Yes.

(Testimony of Louis Nave.)

Q. When you made that statement, then Dr. Barr was in the bath, and what did he say?

A. "When I get the ticks off my clothes, maybe I will take a shower, too. Maybe I have some ticks on me."

Q. Oh, I see. Dr. Barr had not started to take a shower yet when you found the ticks on your clothes?

A. No.

Q. He went in the bathroom after you made that statement?

A. Yes.

Q. And you continued to dress?

A. Yes.

Q. Then what did Dr. Barr say after that, do you recall?

A. Well, when he went in there he said——

Q. Wait a minute. What did he say?

A. What did he say?

Q. Yes.

A. He said, "I got two ticks on me, too."

Q. Where were you when he said that?

A. In the bedroom.

Q. In the bedroom?

A. Yes. [81]

Q. And he was in the shower?

A. Yes.

Q. So what did you do?

A. Then when he said, "I got one stuck above my navel," I went in there and I said, "Do you want me to help you unscrew it?"

Q. What did you go in there for?

A. Just to kid him.

Q. There was nothing unusual, was there?

A. Did you ever have a tick on you?

Q. No.



(Testimony of Louis Nave.)

A. Sometimes it takes two or three.

Q. Or any other kind of insect that I know of; possibly a flea now and then.

A. Sometimes it takes more than that.

Q. The doctor had taken ticks off his body many times?

A. I thought maybe he had one on his back, and I went to look him over.

Q. You went to look him over?

A. To help him out.

Q. Did the doctor look over your back to see if any were on you?

A. No, he didn't. I didn't tell him; he had one sticking on his belly.

Q. You went into the shower? A. Yes.

Q. What kind of shower was it?

A. Just a stall shower.

Q. Just a stall shower? A. Yes.

Q. You went in there and you looked at the tick? A. Yes.

Q. Or did you just look at the place where the tick was? A. No, I looked at it.

Q. The same kind of tick you found in your clothes?

A. I don't know if it was the same. It was a tick on there.

Q. Did it look the same as the one you found in your clothes?

A. Well, the one I found on me—one was spotted, one was a brown one.

(Testimony of Louis Nave.)

Q. I am asking you if it was the same kind of tick as you found on your clothes.

A. I don't know if it was a relative. [82]

Q. Did it look like it was the same kind?

A. Sure it did.

Q. But you did not take it out? A. No.

Q. Did you stay there while the doctor took the tick out? A. No, I walked out.

Q. Did the doctor say that he got the tick out?

A. Yes, he got it out himself.

Q. He told you so?

A. Yes. He said he took it out himself.

Q. He said he took it out himself?

A. Yes.

Q. What did you do with the two ticks you found in your clothes?

A. I didn't do nothing; just left them on the floor.

Q. Just left them on the floor? A. Yes.

Q. Didn't kill them? A. No.

Q. Just knocked them out of your clothes and left them there?

A. They fell off my clothes. I didn't knock them off.

Q. They fell off your clothes? A. Yes.

Q. What part of your clothing were the ticks in?

A. I don't know. Just had a brown suit on. I remarked to him, I said, "I never had this brown suit on when I am hunting. I guess I got them when I transferred the antelope from the truck to the ice house."

(Testimony of Louis Nave.)

Q. Do I understand these two ticks that you saw were not in your hunting clothes at all?

A. No.

Q. They were in your brown suit?

A. Yes.

Q. They were not in your underwear?

A. In my what?

Q. They were not in your underwear, undershirt or underdrawers?

A. The ticks were there?

Q. I said were they there?

A. No.

Q. They were not in your ordinary shirt that you wear?

A. No, on my suit. I got it off the bed.

Q. How long have you had that suit on?

A. When I left [83] the cabin.

Q. When you left the cabin in Lassen County?

A. Yes.

Q. In other words, you got out of your hunting clothes and put on your suit?

A. Yes.

Q. When you got to the auto court you found these ticks?

A. After I came back from putting the antelope in the ice house.

Q. You took the antelope out of the truck and put it in the ice house?

A. Yes.

Q. You came back to the cabin——

A. Took a shower.

Q. Took a shower?

A. Yes.

Q. Was your suit on or off when the ticks fell off of it?

A. My suit was off.

Q. You had taken your suit off?

A. Yes.

(Testimony of Louis Nave.)

Q. As a matter of fact, you did not notice the ticks until after you had taken your shower, isn't that right?      A. Yes.

Q. So when you started to put your suit on, you started to put this brown suit on, that is when the ticks fell off, is that right?      A. Yes.

Q. How long did you see them before they fell off?      A. How long did I see the ticks?

Q. Yes.

A. I seen it as soon as I picked up my suit.

Q. As soon as you picked up your suit you saw the ticks as they fell off, is that right?

A. Yes.

Q. You did not pick them up?      A. No.

Q. Didn't get down and look at them?

A. No. I looked at one on the floor. He had little white spots on him. That is when I referred to the doctor.

Q. Had little white spots on?      A. Yes.

Q. That tick was on the floor?      A. Yes.

Q. And you were standing up?

A. Well, sitting on the bed. [84]

Q. You were sitting on the bed?      A. Yes.

Q. Anyway, your eyes were at least three or four feet from the floor?

A. I didn't measure it. I don't know.

Q. You know how tall you are. You were about in the position you are now in, except you were on the bed?

A. Maybe I was putting on my shoes; I don't know what I was doing.

(Testimony of Louis Nave.)

Q. You were putting on your suit?

A. No, I picked up my suit. Maybe I was putting my shoes on. When I looked at the tick, I don't know what I was doing.

Q. When you looked at the tick, you do not know what you were doing?

A. No, I didn't keep track. I put my pants on, two shoes, and I seen the two ticks there, saw the color, what they were. I seen the white spots, and I spoke to the doctor about it.

Q. We will come to that. Did the ticks fall off your pants or your coat?      A. I don't know.

Q. Were you putting on your pants or coat?

A. My suit was on the bed. I picked up my suit. I probably threw it to one side of the bed there and put my pants on.

Q. Is that what you did, or are you just guessing as to what you did?

A. Well, I put my clothes on.

Q. I know that.

A. That is the way I generally dress; I put my pants on first and then my stockings and shoes on.

Q. When you put your pants on, the ticks fell off?      A. Yes.

Q. They fell off the pants?

A. They fell off my suit when I picked it up.

Q. They fell off when you were moving your suit?

A. Yes. I moved my suit over, grabbed my pants, and I seen these ticks fall off, and I grabbed my shoes, and I noticed what they were.

Q. You noticed what they were on the floor?

(Testimony of Louis Nave.)

A. Yes. [85]

Q. How big were they?

A. About as big as a ladybug—a little bigger than ticks down here.

Q. How big would you say they were? Have you any way of describing them?

A. Bigger than these ticks down here.

Q. I do not know how big the ticks are down here.

Mr. Taaffe: Maybe they grow bigger ticks in Marin County.

The Court: Q. Do you know what a chigger is? It is like a tick. They have them in Texas. You do not know what a chigger is?

A. No. It is something like a ladybug.

Mr. Taaffe: Maybe I can stipulate.

Mr. Mackey: We would like to know from the witness.

Mr. Friedman: Q. Let me ask this question: Here is a piece of paper and pencil.

A. I can't draw.

Q. Just draw a circle about the size of the tick you saw. A. I don't know.

Q. You looked at them. I am not asking you to draw a picture of a tick; just a circle which would be about as big as a tick.

A. I don't know how to draw it.

Q. I don't want you to draw a tick; just something that would be about the same size as the tick.

(The witness did as requested.)



(Testimony of Louis Nave.)

Mr. Friedman: About like that. I will ask that this be marked as an exhibit on the cross-examination of the witness.

(The document was marked "Defendant's Exhibit A.")

Mr. Friedman: Your Honor, I notice it is twelve o'clock.

The Court: This case may be continued until two o'clock.

(Thereupon a recess was taken until 2:00 p.m. this date.) [86]

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Tuesday, November 2, 1943—2:00 P. M.

Mr. Taaffe: May I call Dr. Merrill out of order now?

MALCOLM H. MERRILL

called for the plaintiff; sworn.

The Clerk: Please state your name to the Court.

A. Malcolm H. Merrill.

Mr. Taaffe: I think a stipulation is in order at this time concerning the blood about which this witness is to testify. I do not know whether we discussed it with you, Mr. Friedman, but Mr. Mackey and I discussed it. Rather than bringing Miss Marston, the laboratory technician who took the blood specimens of Dr. Barr, to the stand to testify preliminarily to the testimony of Dr. Eaton

(Testimony of Malcolm H. Merrill.)

and Dr. Merrill, I think it is agreeable that we stipulate that the blood specimens about which both Dr. Merrill now and Dr. Eaton after him are to testify were specimens of the blood of the decedent, Arthur Barr, taken on Thursday or Friday, June 4 or 5, 1942 by Theresa Marston, and that she kept those blood specimens in a refrigerator until they were turned over to the State Board of Health on June 12, 1942. Is that correct, as you understand it, Mr. Mackey?

Mr. Mackey: That is correct. I understood the whole blood was taken on the 5th. However, if that becomes material I suppose we may under the stipulation clear that up at a later time.

Mr. Taaffe: Yes, certainly; subject to check and correction, we can stipulate. I take it you are so stipulating, Mr. Friedman?

Mr. Friedman: I will so stipulate. [87]

#### Direct Examination

Mr. Taaffe: Q. Will you state your name in full, please? A. Malcolm H. Merrill.

Q. What is your occupation?

A. I am chief of the Division of Laboratories, California State Health Department.

Q. Are you a graduate of any school, Doctor?

A. School of medicine?

Q. Yes. A. What school of medicine?

Q. What school of medicine.

A. St. Louis University.

Q. Are you a physician and surgeon?

A. Yes.

(Testimony of Malcolm H. Merrill.)

Q. When you speak about being chief of the laboratories, those are the laboratories of the State Board of Health, are they?

A. That is correct.

Q. In other words, you are attached to and employed by the Board of Health of the State of California, is that so? A. That is correct.

Q. In what special capacity are you acting, if any, for the State Board of Health?

A. As chief of that division, Laboratory division.

Q. What are your duties generally in the capacity which you occupy, Doctor?

A. Supervision of laboratory work, State laboratory.

Q. Did you receive, Doctor, certain specimens of blood which purported to be, and which we are stipulating was, the blood of Arthur Barr, a resident of San Rafael, in the month of June 1942?

A. Yes, we did receive that.

Q. Do you have a recollection or a record of the date when you received that blood specimen?

A. We have a record of the date, yes.

Q. Can you consult your record and tell us the day? [88]

A. That was on June 12, 1942.

Q. What was the occasion, Doctor, of the procurement or receipt by the Board of Health of the specimen of the blood of Arthur Barr? What occasioned the investigation of that blood?

Mr. Friedman: Well, I think that is wholly

(Testimony of Malcolm H. Merrill.)

immaterial and I will object on that ground, your Honor. Whatever prompted anybody to send the blood to that laboratory, to this doctor, is not material. I think all that is material is that he received it and what he did with it.

Mr. Taaffe: Here is all I have in mind, if your Honor please: Certain duties are imposed upon departments such as the State Board of Health in connection with various matters, especially those matters which are the subject of their epidemiology department, that is, in connection with the possible spread of diseases and the like of that. Now, if it was in his official capacity, as a part of his duties, we have a right to show what occasioned it. Suppose, for instance, there were a widespread epidemic of one sort or another; wouldn't it be perfectly all right to ask a witness occupying an official position as Dr. Merrill does, "What occasioned your investigation of that particular disease?"

The Court: Wouldn't it depend upon what somebody told him?

Mr. Taaffe: The report that was made prior to the death of Dr. Barr to the State Board of Health.

The Court: Do you want to show that somebody on behalf of the decedent or the family presented a specimen to the Board of Health?

Mr. Taaffe: Dr. Homer Marston, if it please your Honor, who was the attending physician at the time of the death, reported it to the Board of Health. [89]

(Testimony of Malcolm H. Merrill.)

The Court: I do not suppose counsel will dispute that the attending physician sent a sample of the blood to the Board of Health?

Mr. Friedman: No.

Mr. Taaffe: It goes further than that, if your Honor will bear with me a minute. If your Honor remembers the line of interrogation pursued by Mr. Friedman this morning, and quite properly—he has a right to do it—but your Honor will remember his line of interrogation when cross-examining the witness Mr. Nave, he was asking Mr. Nave questions which I thought, at the time at least, were intended to discredit his testimony that Arthur Barr was bitten by a tick and that he saw the tick at that time. Now, if we can show reports to the State Board of Health at any time, especially prior to the death of Arthur Barr, of course, it would discredit any claim that——

The Court: You want to show that a report was made to the Department of Health that the doctor was sending the blood because of the fact that the man was bitten by a tick?

Mr. Taaffe: Right; exactly; that a report was made that there was in San Rafael a tick bite case.

The Court: You want to meet the defense that this was an afterthought, a trumped-up story?

Mr. Taaffe: Right, especially in view of the line of cross-examination pursued this morning.

Mr. Friedman: You can indulge in any conclusion you want with respect to the purpose of my cross-examination, but I want to add to my object-



(Testimony of Malcolm H. Merrill.)

tion that any testimony of the doctor on the stand as to why the blood was transmitted to him for investigation is hearsay and certainly declarations that are not binding upon either of these defendants in this case. [90]

Mr. Mackey: May I ask counsel, do you intend to show by the witness that an examination for tick-borne diseases was requested to be made?

Mr. Taaffe: No, only that Dr. Marston—I am only reporting what I expect to prove by the witnesses—Dr. Homer Marston informed me prior to the death of Dr. Barr he reported this case as a tick-bite case to the State Board of Health; that pursuant to his report a Miss Ames, I believe it was, of the State Board of Health, called at Miss Marston's laboratory in San Rafael and procured a specimen of blood.

The Court: Who is Miss Ames?

Mr. Taaffe: She is connected with the Board of Health. She came from the State Board of Health and procured the specimen of blood, and she turned that blood over to Dr. Eaton and she turned another portion of it, or Dr. Eaton did, to Dr. Merrill.

The Court: Dr. Merrill would only know what Miss Ames told him.

Mr. Taaffe: Pardon me?

The Court: This witness would only know what Miss Ames told him.

Mr. Taaffe: I do not know whether he was the one who gave her instructions. He would know



(Testimony of Malcolm H. Merrill.)

what Miss Ames told him, or he might have instructed Miss Ames.

The Court: Are you going to have Miss Ames here?

Mr. Taaffe: No, we have eliminated Miss Ames and Miss Marston by a stipulation that it was Dr. Barr's blood.

The Court: Are you going to have Dr. Marston as a witness?

Mr. Taaffe: Dr. Marston will be here tomorrow morning to testify, and he will testify he made a report of this to the [91] State Board of Health.

The Court: If you are going to have direct testimony of Dr. Marston that he did so report it to the Board of Health, it probably would not help very much to have this witness testify with respect to that matter unless he talked with Dr. Marston.

Q. Did you talk with Dr. Marston?

A. I did not, no.

Mr. Taaffe: Under the circumstances and your Honor's suggestion——

The Court: If that is your point, you can make it quite simply from the testimony of Dr. Marston, can't you?

Mr. Taaffe: I will prove it, then, by Dr. Marston, your Honor.

Q. You have already testified, I believe, Dr. Merrill, that you did procure a specimen of blood which purported to be, as is stated, and which we stipulated to be, a specimen of the blood of Dr. Barr on June 12, 1942?

(Testimony of Malcolm H. Merrill.)

A. We received such specimen.

Q. You received such specimen? A. Yes.

Q. From whom did you receive the specimen with which you performed your investigation later on?

A. I am not certain whether that came from Dr. Eaton or whether Miss Ames delivered that direct to the laboratory.

Q. It was one or the other?

A. It was one or the other.

The Court: Q. Who is Dr. Eaton? One of your colleagues?

A. One of my colleagues in the State Building.

Mr. Taaffe: He is in the courtroom, your Honor, I understand, and I am going to put him on next.

Q. Answer this question yes or no, please, Doctor: Did you make certain investigations concerning that blood? A. Yes, we did. [92]

Q. For what purpose? For what object or purpose?

A. For the purpose of attempting to determine the—to assist the physician in making the diagnosis of the disease.

Q. And the physician was who?

A. The physician's name on the card that came to us was Dr. Marston.

Q. Do you have that card?

A. I have the card, but there is a point of procedure I think perhaps that we should clear. Any records that we have in our State Health Department files are confidential records, and in my sub-

(Testimony of Malcolm H. Merrill.)

poena here, I was subpoenaed but there was nothing said about records, and in order to clear this matter, before the records are produced, I wonder if we could have, your Honor, a stipulation——

The Court: Q. Do you have the record with you?

A. I have the record with me.

The Court: You may produce it, then.

Mr. Taaffe: Q. Will you show me that record concerning Dr. Marston?

A. I have three reports that were sent back.

Mr. Mackey: Q. May I ask, Doctor, are the notes that you handed to counsel the ones that were made by Mr. Nicewonger?

A. That is correct.

Mr. Taaffe: Q. Doctor, what specimens or material did you receive, either from Miss Ames, Dr. Eaton, or anyone else, purporting to be those relating to this case of Dr. Barr?

A. Specimen of whole blood.

Q. That is all that you received, is that correct?

A. That is all that we received.

Q. When you made your investigation or experiment, what were you looking for?

A. We were looking for, in the first place, plague and tularemia, and, secondarily, the animals that were inoculated were followed for evidences of Rocky Mountain [93] spotted fever.

Q. What experiments did you make, Doctor, for the purpose of arriving at some determination in this matter?

(Testimony of Malcolm H. Merrill.)

A. Three lines of investigation were followed: The blood was cultured into culture media in an attempt to demonstrate any pathogenic bacteria that might be present. The blood stream was tested for its agglutinant activity against known cultures or known organisms, and laboratory animals, guinea pigs, were inoculated with the whole blood.

Q. The result of all those tests was what?

A. Our cultures were negative; our agglutination tests were negative; and our animal inoculations were negative.

Q. Did you know or understand at that time, Doctor, that those specimens of whole blood were taken on the 4th or 5th of June 1942?

A. The first information we had on it was the note from Miss Ames accompanying one of these forms which stated that specimens were taken on the 3rd.

Mr. Taaffe: I think it will be stipulated, counsel, it could not be taken earlier than the 4th?

Mr. Mackey: No, it could not. I could certify to that.

Mr. Taaffe: Is that correct?

Mr. Mackey: That is correct.

Mr. Taaffe: Do you know that to be the fact, Mr. Friedman?

Mr. Friedman: If Mr. Mackey says it is a fact, it must be correct.

Mr. Taaffe: I know it to be a fact also. The earliest date it could be taken would be the 4th, because Dr. Marston was not called in until the 4th.

(Testimony of Malcolm H. Merrill.)

Q. Would you please repeat your answer concerning known types of bacteria, or whatever your answer was with respect to what [94] you were looking for in this blood?

A. I stated we tested the serum from this blood with agglutination against known bacterial suspensions.

Q. And you did not get any positive results of any kind or character, did you?

A. That is correct.

Q. Now, this blood was taken on the 4th. The man died on the 6th. Nothing that you discovered in the blood would give any indication that he had any of the known strains of bacteria or disease in his bloodstream on the 4th, is that correct?

A. Our tests were directed only against those three conditions.

Q. Against those three?

A. And we had no evidence that any of those three were present.

Q. Did you find any other evidence of the presence of any death-dealing infectious element in the blood?

A. We looked for no other agents as that in the blood culture and we found no other organisms.

Q. In your blood culture you extended your examination beyond an investigation of evidences in the bloodstream of Rocky Mountain spotted fever, tularemia, and plague; that is correct, isn't it?

A. You mean if there had been other organisms there we would have found them?



(Testimony of Malcolm H. Merrill.)

Q. Yes.

A. Yes, if there had been an organism such as an outside organism or something of that sort, it should have shown up in the culture.

Q. Or any other organism that you regard as infectious or which might result in death; that is correct, isn't it?

A. No, I could hardly say that, because the culture technique used would not support the growth of all pathogenic organisms.

Q. Would the investigation have supported a determination with respect to any pathogenic organisms in addition to the three [95] you mentioned specifically?

A. I would say some.

Q. You found none of those?

A. None of those were found.

Q. In other words, so far as your determination was concerned, you found nothing that would indicate the cause of death; is that correct.

A. Yes, I think it is safe to say that is correct.

Q. Doctor, you are engaged in making laboratory determinations concerning blood specimens very often, to say the least; that is correct, isn't it?

A. That is correct.

Q. You know that the blood specimens in this case with which you worked were taken within a day or two after the onset of the disease; that is correct, isn't it, or at least that was your information, wasn't it?



(Testimony of Malcolm H. Merrill.)

A. That was the information we had, yes.

Q. Is a specimen that is taken that early after the onset of a particular disease expected to return a positive reaction?

Mr. Friedman: I object to that until he specifies which one of the three reaction tests he is speaking about, your Honor.

Mr. Taaffe: He can answer it with regard to any of them.

Q. With respect to any of these tests, Doctor, is a specimen taken within a day or two after the onset of the disease conducive toward a positive test or reaction?

Mr. Friedman: I am going to object on the ground it appears to me he is attempting to impeach his own witness.

Mr. Taaffe: Not in the least. I have produced a witness who investigated something. I wanted the Court to know all the facts. I did not intend to impeach him. I understand from what he has explained to me that his tests are inconclusive, one of the reasons being you should wait until the disease of this general nature has taken a course of eight or nine days [96] instead of one or two days.

Mr. Mackey: I think you are speaking about the agglutination test. I understand there is a distinction between the tests.

The Court: I will overrule the objection.

Mr. Taaffe: Q. Will you answer?

(Testimony of Malcolm H. Merrill.)

A. That question is directed with reference to those specimens, or is that with reference to my opinion as an expert in analyzing the material that comes?

Q. To these specimens here.

A. Will you repeat the question, please?

Q. The question generally was this, Doctor: Is a specimen which is taken a day or two after the onset of a disease such a specimen as ordinarily is expected to produce a positive reaction?

A. Some of the procedures that we use we would expect a positive reaction, yes.

Q. Which procedures do you refer to in that connection?

A. Cultures and the animal inoculations are the specific diseases for which we test it. It is limited to those.

Q. Is it or is it not a fact, Doctor, that one blood culture, or, rather, one blood specimen taken at one time will return a positive reaction and another blood specimen taken of the same subject at another time will return a negative reaction?

Mr. Mackey: Which experiment, please, counsel?

Mr. Taaffe: Any one of them.

A. Oh, there are varying factors: The factor of time in the disease is the important one, of course. There would be variation as the disease progresses.

Q. When you speak about variations in time influencing the determination, what do you mean by that?

(Testimony of Malcolm H. Merrill.)

A. I mean we would [97] expect to find organisms in the bloodstream at certain stages of the disease and not at others.

Q. At what stages of the disease would you expect to——

A. Which disease?

Q. Any one of the three diseases you mentioned: Rocky Mountain spotted fever, plague, and tularemia.

A. In Rocky Mountain spotted fever we would expect to find organisms in the blood stream the first week of infection.

Q. How early in the first week?

A. As soon as the acute symptoms begin.

Q. By "acute symptoms" you mean what?

A. As soon as the man really gets ill.

Q. Isn't it a fact in such cases you can often take a specimen and get a negative reaction from your first specimen, and then take a second specimen and get a positive reaction, taken at approximately the same stages?

A. There isn't anything absolute, of course, in it. But I say in general we would expect to find the organisms present early in the infection.

Q. Have you made any similar tests heretofore for the purpose of making determinations as to the existence of these three diseases?

A. Such tests have been made in the laboratory.

Q. Have you ever made them before?

(Testimony of Malcolm H. Merrill.)

A. Well, I have supervised tests on tularemia and plague, but not specifically in previous instances on Rocky Mountain spotted fever.

Q. Does the condition in which the blood is kept in the interim between the taking of the whole specimen and the receipt of that specimen and the performance of the experiment by yourselves have any influence on the accuracy of a determination?

A. Yes.

Q. What are the conditions under which the blood must be kept [98] in order to insure accuracy?

A. Well, there is not only the question of temperature; there is the question of time. In general, the lower the temperature the longer the agent will survive.

Q. In other words, your blood specimen must have what I believe I am correctly characterizing as viability; that is correct, isn't it?

A. The organisms, yes.

Q. The organisms must have life, in other words?

A. Yes.

Q. Time enters into the question as to whether they do or do not have life, is that right, Doctor?

A. That is right.

Q. Now, keeping in mind that in this case, Doctor, this specimen was taken on either the 4th or 5th of June and that you did not get this specimen until the 12th of June, would the interval elapsing have any influence on the possibility of getting a positive or negative reaction?

(Testimony of Malcolm H. Merrill.)

A. Well, the interval elapsing, regardless of what that interval is, would have an influence.

Q. What influence would it have?

A. Well, in general the organisms tend to die out after the specimen is taken.

Q. Do you regard seven or eight days as a rather considerable interval elapsing between the taking of the specimen originally from the subject and the beginning of the performance of your experiments or demonstrations as an unusual length of time?

A. It would depend upon how the specimen is taken or how the specimen is kept.

Q. This specimen was kept, we have stipulated, in a refrigerator. Now, keeping that in mind, would the lapse of seven or eight days have any possible influence on the possibility of success in your tests?

A. It would have an influence, yes.

Q. In other words, after the lapse of that length of time, [99] even though the specimen was kept in a refrigerator, the organisms might not be viable; is that the situation?

A. Well, they might not be, but, on the other hand, they might be.

Q. But you have no way of determining that?

A. Only by experience of others who have done a similar type of work.

Q. Can you make an experiment, Doctor, for the purpose of determining, exclusive of everything else, whether the organisms are viable, or do you make a determination in that regard solely and ex-



(Testimony of Malcolm H. Merrill.)

clusively upon the positive results that sometimes accrue?

A. Experiments could be devised to demonstrate the rate of loss of viability of a blood specimen with time.

Q. Nothing was done in that regard in this case?

A. Not in this case, because we received the blood late, that is, after the time interval you have mentioned.

Q. You do not know whether the organisms were then viable or non-viable at the time you received the blood specimen, do you?

Mr. Friedman: What organisms?

Mr. Taaffe: The organisms in the bloodstream.

Mr. Friedman: He said there weren't any of these three things.

Mr. Taaffe: Any organisms, I am speaking of.

The Witness: Oh, we know we did not demonstrate any viability.

Mr. Taaffe: Q. You did not demonstrate any. It is entirely possible, under all the circumstances that you know of concerning the taking of this specimen, that is, as to the time interval elapsing and the conditions under which it was kept, which have already been related to you, that all organisms [100] may have been non-viable in this case; isn't that correct?

Mr. Mackey: If your Honor please, I want to object to that question on the ground that this case



(Testimony of Malcolm H. Merrill.)

involves a burden of proof on the plaintiff. Now he is trying to prove it is not impossible that there may have been rickettsia in the blood.

The Court: I appreciate that, Mr. Mackey. It may be counsel has other evidence.

Mr. Taafe: Yes, I do, your Honor.

The Court: In and of itself it would only be in the nature of a negative support of a burden of proof.

Mr. Taafe: I could have let them put this witness on the stand. I knew they had him under subpoena, and I could have cross-examined on these questions. I sought to suit the convenience of this man, if it please your Honor.

The Court: Unless it is connected up, of course, or there is other evidence—it might be material if there is other evidence on this subject that is of more positive nature.

Mr. Taafe: I will produce evidence of the existence of rickettsia in live bodies, the rickettsia being what we are looking for here.

The Court: Let the testimony come in and it can be stricken out later or given the proper weight if there is no other testimony.

Mr. Friedman: If there is no other testimony it has no weight at all.

The Court: I was putting it in a little different manner.

Mr. Taafe: In addition I want to put in every

(Testimony of Malcolm H. Merrill.)

witness who knows anything about this case in any manner, shape or form.

Q. In your opinion, Doctor, do you regard the tests which you made as a conclusive determination as to whether there were or [101] were not the organisms of anything you were looking for in the blood in this case?

A. It is pretty difficult in a diagnostic test to say that any one is conclusive evidence. I would have to answer your question as "No."

Mr. Taaffe: That is all.

### Cross Examination

Mr. Mackey: Q. Dr. Merrill, did any one of these three tests that you conducted have as its object the determination of whether or not there were any of the bodies that cause virus pneumonia present.

A. None of the tests that we conducted in our laboratory, our branch of the laboratory, were for that purpose.

Q. You said with respect to the preservation of blood samples that you had done some reading on the effect of lapse of time and temperature conditions that attend the preservation. Have you formed any opinion from your reading as to how long specimens of blood may be kept on ice with the bodies, the rickettsial bodies therein remaining infective?

A. The rickettsial bodies of Rocky Mountain spotted fever?

(Testimony of Malcolm H. Merrill.)

Q. Yes.

A. Yes, regardless of the procedure used in maintaining the blood specimen or tissue specimen, whatever it is, the organisms tend to die out. The rate at which they die will depend upon the environmental conditions, the temperature being perhaps the most important factor.

Q. Assuming that the temperature is that of such a refrigerator as a pathological laboratory would maintain, would it be your opinion that the pathogenic qualities of any rickettsia that we assume were in such blood would have disappeared within seven or eight days?

A. From the limited proof in the published reports that have come to my attention, maintained in a [102] refrigerator a blood specimen has an initial high concentration of rickettsial bodies—by that I mean a thousandth of a cubic centimeter, being a minimum infective dose—such a blood maintained at our usual refrigerator temperature of 40° F. or a little below would appear to remain viable to the extent that at least a cc. will cause infection up to twelve days or two weeks, and if kept in a frozen state, I think there are some reports that it will retain its viability beyond twenty days.

Q. So that in any given case if you kept the blood on ice, and if that blood came from a human infection that was fulminating and violent, you would expect the rickettsia to retain their infective

(Testimony of Malcolm H. Merrill.)

qualities in so far as the guinea pigs are concerned for periods considerably in excess of seven or eight days?

A. If the material were kept continually cool.

Q. It was stipulated here that the blood was kept on ice from the time it was removed from the patient up until it was transported from San Rafael to the pathological laboratory.

A. May I qualify that a little further? It would be expected that there would be a decrease, a progressive decrease, even at that temperature in the amount of infective material present.

Q. But the fact is, isn't it, Dr. Merrill, that immune guinea pigs do not occur in nature?

A. So far as I know, guinea pigs are uniformly susceptible to Rocky Mountain spotted fever.

Q. Were these guinea pigs that were inoculated with Barr blood observed for scrotal reaction?

A. Yes, over a period of——

Q. When you have a guinea pig inoculated with what is known to be blood-retaining rickettsial bodies, what reaction, if any takes place in the scrotum of the animal?

A. There is swelling and edema. [103]

Q. And is that a rather highly susceptible organ of the guinea pig to such a reaction? A. Yes.

Q. It is contended by the plaintiff in this case that the insured, the decedent, was bitten by a tick at some time between May 28 and May 30—correct me if I am wrong in that respect, counsel——

(Testimony of Malcolm H. Merrill.)

Mr. Taaffe: Between what dates?

Mr. Mackey: May 28 and 30, inclusive.

Mr. Taaffe: 31st.

Mr. Mackey: I think the last day after hunting was the 30th.

Mr. Taaffe: The 30th, but the tick was actually seen on him on the 31st.

The Court: Yes.

Mr. Mackey: Q. Assuming that a patient from whom blood is taken were bitten by an infected tick at some time between the 28th of May and the 31st of that same month, and that he was taken to the hospital on the evening of June 4, and that he died from the effect of such tick bite at about four o'clock in the morning of the 6th—less than forty-eight hours from his introduction into the hospital—and that a specimen was taken, say, midway between the onset and death of his blood and continually kept under normal laboratory refrigeration until delivered to Miss Ames, who took it from San Rafael to the pathological laboratory in Berkeley; and further assuming that inoculations of that blood were made into guinea pigs, as you have testified, what reactions with respect to temperature and scrotal swelling would you normally expect to find?

A. Well, I would rather answer that this way: that if the rickettsia were present in a viable state with as much as [104] a minimum dose, we would expect to obtain scrotal swelling and an elevation



(Testimony of Malcolm H. Merrill.)

of temperature in the guinea pig within the observation period that we carried the animals.

Q. And what was the length of that observation period?      A. Two weeks.

Q. You would have expected under those circumstances to have scrotal swelling within the two weeks if there had been a violent rickettsial infection in the blood?

A. I said we would expect to find it if rickettsia had been in a viable state when we got the blood to the extent of there being a minimum infective dose present.

Q. What would you say with respect to the probabilities of the viability of the rickettsia that we assume were there?

A. It is difficult to arrive at an estimate of probabilities, because that particular type of experiment apparently has been done so infrequently, and all we can say is that the limited number of published reports indicate that the virus remains viable in whole blood up to certainly twelve days if it is kept constantly at ice-box temperature; that is, assuming there is a large amount there in the first place, and most of those experiments have been done on blood from laboratory animals.

Q. If you had a highly fulminating and violent case of spotted fever, would that indicate a large amount of rickettsia in the patient?

A. I think during the most acute stage of the dis-



(Testimony of Malcolm H. Merrill.)

ease we would expect to find probably a rather high percentage of rickettsia in the bloodstream.

Q. In fact, immediately after the onset you would expect to find more rickettsia in the blood than you would at a period some six or seven days later, would you not, Doctor?

A. Than six or seven days later; but there is some evidence to [105] indicate that it may be higher in the midst of the first week than it is initially; but that evidence, I do not think, is too conclusive. So I do not think from what I have noted published on the subject—I am not sure that it is too definite.

Q. In your opinion, in the later stages of the illness you would find the rickettsia, rather than in the bloodstream, in the tissues would you not?

A. Yes. It tends to disappear from the bloodstream toward the end of the first week of infection ordinarily.

Q. In your opinion you applied to this blood specimen the three standard tests that are known in science and used uniformly in science to detect the presence of rickettsial bodies?

A. Well, there are two standard tests that are used actually to detect the presence of rickettsial bodies.

Q. You used both of those, did you not?

A. That is right.

Q. And so far as your results of your experi-

(Testimony of Malcolm H. Merrill.)

ments were concerned, there was no showing that rickettsial bodies, pathogenic and guinea pig, were present in Dr. Barr's blood?

A. That is right.

Q. May I ask one more question, Doctor: The tests that you did make were not calculated to determine whether or not there were in that blood any of the bodies that ordinarily cause the so-called atypical or virus pneumonia?

A. Not the tests that we did in our branch of the laboratory.

Mr. Mackey: That is all.

Mr. Friedman: I have no questions.

#### Redirect Examination

Mr. Taaffe: Q. Doctor, I understood you to say that so far as you knew guinea pigs are uniformly susceptible to Rocky [106] Mountain spotted fever; do you remember using that expression—so far as you knew? A. Yes, I used that.

Q. And you also said from the limited number of reports that you read you believed organisms would retain their viability; do you recollect that answer? A. Yes.

Q. Now, Doctor, did you read any of the reports on this subject, that is, concerning rickettsial diseases, by Dr. Ludwig Anegstein and Madera M. Boettcher of the University of Texas?

Mr. Friedman: If the Court please, we object to that as impeaching his own testimony.

(Testimony of Malcolm H. Merrill.)

Mr. Taaffe: This is not for the purpose of impeachment. I am not attempting to impeach the man at all. I simply want to see if I can correct him on this proposition about the susceptibility of guinea pigs. He said so far as he knows. I want to find out what he means by that. Let me withdraw the question in the interest of expedition and to forestall controversy.

Q. What do you mean by the expression, Doctor, so far as you know guinea pigs are uniformly susceptible to inoculation of Rocky Mountain spotted fever?

A. I am basing that statement on statements that I have read in some of the articles concerning this disease.

Q. In those same articles have you also read, Doctor, that several guinea pigs have been inoculated with the same specimen or parts of the same specimen; some remained febrile and some became afebrile?

Mr. Friedman: Objected to as cross-examining his own witness.

The Court: I think that is true. I will sustain the objection. [107]

Mr. Taaffe: Q. Doctor, do those articles about which you have testified say that guinea pigs were susceptible?

Mr. Friedman: Same objection.

Mr. Taaffe: This is something brought out on

(Testimony of Malcolm H. Merrill.)

cross-examination, your Honor, and about which we did not ask him at all.

Mr. Friedman: Oh, yes, the cross-examination of Mr. Mackey was directed to your examination as to the conclusiveness of these tests.

Mr. Taaffe: He answered on cross-examination a question which we did not ask him—anything about the susceptibility or the uniformity of the susceptibility of guinea pigs to inoculation. We did not ask him that at all. He has given that answer, and whether he be our witness, or not, we are bound by that answer. We want to find out if the article also said some guinea pigs were exempt or immune.

Mr. Friedman: He is entitled to base his opinion on the articles that he read.

Mr. Taaffe: I can simply ask him to produce the articles, if it please the Court. All I am trying to do is to show this witness there is a contrary view in connection with it. If you have any objection to it, I will ask the doctor to produce the articles. I have done you people a favor in producing this man and putting him on as a direct witness.

Q. . Can you produce the articles which show that guinea pigs are uniformly susceptible?

The Court: Mr. Taaffe, you can produce another witness—the law is pretty clear on that—if you want to bring out and make the point that the doctor's testimony on the subject of the immunity of guinea pigs is not wholly correct; but I do not think

(Testimony of Malcolm H. Merrill.)

it would be proper to take your own witness, this [108] same witness, after that has been brought out.

Mr. Taaffe: All right. Let me put it this way. I think I have the right to ask this question.

Q. Doctor, can you produce any of the articles, or can you identify them, give us the name of them, and we can dispense with that—any of the articles that you speak of that show that guinea pigs are uniformly susceptible to Rocky Mountain spotted fever?

Mr. Friedman: Same objection.

The Court: I will allow the question.

Q. Can you answer that?

A. I can give the specific reference to the statement I had in mind.

The Court: All right; overruled.

The Witness: I can't do it right now.

The Court: You mean you will have to look it up?

The Witness: I may have it in a note or two here that I could look at.

(After examining documents) I can't put my hand immediately on the statement.

Mr. Taaffe: I know the doctor has to be back in Berkeley at three-thirty, so may I ask him this question and let it go at that:

Q. Will you communicate with me, Doctor, if you find any such article?



(Testimony of Malcolm H. Merrill.)

A. Yes. It is one of two or three articles. I do not recall exactly which one it is. And there is a statement by the author to that effect, and it was assumed that it was more than a minimum effective dose with which the animal was inoculated. In other words, if you get near the borderline of minimum effective dose, it is natural that some of the animals will not come down. [109]

Q. What was the dose that you employed in your dose here? A. One cc.

Q. What is the minimum effective dose, Doctor?

A. Well, it would depend upon how much virus there happens to be in the particular blood that you are testing, and that will vary from animal to animal and from case to case.

Q. Do you know whether or not the one cc. dose you used in this case was a minimum effective dose?

A. It wasn't in this case, because it did not effect the animals.

Q. It might have required a greater dose, is that correct?

A. It might have. In other words, if 10 cc. had been used it might have been positive, but we have no way of knowing that.

Q. Will you communicate that report to us if you lay your hands on it. A. Yes.

#### Recross Examination

Mr. Mackey: Q. It is a fact, Doctor, that doses a great deal smaller than one cc. have transmitted



(Testimony of Malcolm H. Merrill.)

the infection to guinea pigs in laboratory experiments?

A. Where the blood is immediately transferred from patient to animal.

Q. How small is that dose sometimes? What degree of minuteness may that dose approach?

A. In the case of guinea pig blood it can approach .001 cc.

Q. .001 cc.?

A. I do not know that it has been established in humans, however.

Mr. Mackey: That is all.

Mr. Taaffe: Q. That is where it is transferred directly from the patient to the guinea pig?

A. That is where it is transferred from a guinea pig to a guinea pig.

Q. From a guinea pig to a guinea pig?

A. Yes.

Q. Crossing——

A. Simply transmitting infection from one [110] infected guinea pig to a normal guinea pig.

Q. A transmission test?           A. Yes.

Mr. Mackey: May I ask one more question?

Q. With the fact in mind, Doctor, the plaintiff's contention in this case is that the deceased died less than forty-eight hours from the onset from a tick bite—with that fact in mind, and the blood taken midway between onset and death in your mind, and with the admission that the blood was kept in a laboratory refrigerator from that time

(Testimony of Malcolm H. Merrill.)

until it was transported from San Rafael to your laboratory, what is your opinion as to the soundness of the particular amount of blood which you inoculated into the guinea pigs for experimental purposes?

A. You mean would I have expected to find it positive?

Q. Yes, from that size dose under those conditions and circumstances.

A. Well, I think it would be approaching the borderline, certainly, if we had expected it to be positive. It could have been, but it very well could not have been, too.

Q. In any event, the result of your experiments, whatever their value be, was to show that no rickettsial bodies were demonstrated by any of the three methods used?

A. In the blood at the time that we received it.  
Mr. Mackey: That is all.

Mr. Friedman: Q. Let me ask you this, Doctor: In view of all the facts you knew about this blood specimen and where it came from, the virus tests you did subject it to were at the time, in your opinion, sufficient to produce positive results provided these bodies were there?

A. Provided they were still there in sufficient concentration, but I could give no guarantee that they would have persisted and been there in sufficient concentration at that time. [111]

(Testimony of Malcolm H. Merrill.)

Q. Well, if a specimen had come from a person who was not infected with these rickettsial bodies, there would have been nothing in the blood that would produce positive results; isn't that so?

A. We would not have expected it.

Q. Of course not; but under the circumstances, you took those tests for the purpose of discovering whether these bodies were present or bodies that were connected with any one of these three things—plague, tularemia and Rocky Mountain spotted fever; is that correct?

A. That is correct, with the specimens that we had available for testing.

Q. Of course, and the tests that you did indulge in were those that you believed would produce positive results if there were bodies sufficiently present to produce a positive result?      A. Oh, yes.

Q. And upon getting a negative result under the circumstances you so reported back to the doctor; is that correct?      A. That is correct.

Mr. Friedman: I think that is all.

Mr. Mackey: That is all.

The Court: The Court will take a brief recess at this time.

(Recess.)

## MONROE D. EATON

called for the plaintiff; sworn.

The Clerk: Please state your full name.

A. Monroe D. Eaton.

## Direct Examination

Mr. Taaffe: Q. What is your occupation?

A. I am Medical Bacteriologist. [112]

Q. Are you officially connected with the State Board of Health in any capacity?

A. I am Director of the Research Laboratory of the State Department of Public Health.

Q. Located in Berkeley, California?

A. Yes.

Mr. Taaffe: I take it that the qualifications of Dr. Eaton will be stipulated?

Mr. Mackey: Yes, indeed.

Mr. Taaffe: Is that right, Mr. Friedman?

Mr. Friedman: Yes.

Mr. Taaffe: Q. Dr. Eaton, did you perform some experiments or seek to make certain determinations of a part of the same specimen of blood that was procured by Dr. Merrill, who preceded you on the witness stand? A. Yes.

Q. Specimens which purported to be the blood of Dr. Arthur Barr, is that correct? A. Yes.

Q. Of what did your investigation and experiments consist?

A. We inoculated three cotton rats into the heart, and one cotton rat intranasally.

Q. Anything else?

(Testimony of Monroe D. Eaton.)

A. We examined tissue sections from the case that were submitted to us by Dr. Carr.

Q. And what were the results of your various determinations? A. Which ones?

Q. First your injection of the rats.

A. Entirely negative.

Q. And what were the results of your examination of the tissue sections?

A. Do you want me to state what my opinion is as to what the pathology in this case was?

Q. Yes.

A. Well, the pathology was that of a virus pneumonia.

Q. What leads you to that conclusion, if you will explain?

A. Well, it is awfully hard to state this without using technical [113] language.

Q. We will probably ask you to explain the technical language. We won't understand it.

A. The character of the exudate in the lungs and the cellular action around the bronchi and blood vessels was very much the same as that which we see in other cases of virus pneumonia.

Q. Did you find any bodies that you were able to identify?

A. We saw no bodies we could identify positively.

Q. Did you see any rickettsia-like bodies?

A. No.

Q. Do you regard your determinations as conclusive, Doctor? A. Which ones?

(Testimony of Monroe D. Eaton.)

Q. Any of them.

A. Well, I think the pathology was very suggestive. It was very definite that the man had a pneumonia.

Q. A virus pneumonia?

A. Probably due to a virus.

Q. What is a virus?

A. Well, a virus is defined in the dictionary as a harmful or noxious agent. The term generally means a submicroscopical organism which is not cultivated in the ordinary media used for the demonstration of bacteria.

Q. Do you regard your investigation and tests with the rats as conclusive?

A. No, because we did not have the proper specimens for this sort of a test.

Q. In what regard did you feel they were improper?

A. We were interested in this case because it was reported as a virus pneumonia. We used these animals to demonstrate one of the agents which we believe causes virus pneumonia. Blood is not the proper specimen to use for those tests. We should have had sputum or specimens of fresh lung tissue, which we did not have.

Q. By the way, the specimens or sections of lung that were taken and submitted to you in this case showed evidence that [114] the body had been embalmed before the sections of specimens were taken?

A. We knew that.



(Testimony of Monroe D. Eaton.)

Q. You knew that had taken place?

A. Yes.

Q. When you say you should have fresh lung tissue, you mean to differentiate between lung tissues before embalming and lung tissue after embalming?

A. No, for the purpose of isolating the causative agent.

Q. In the absence of the section or specimen being fresh, as you have characterized it, would you regard your tests as conclusive?

A. Well, we did no animal inoculation with the lung tissue because of the fact that the body was embalmed, and therefore any evidence that would be in there would be dead and not transmissible to the animals which we inoculated.

Q. When you speak about the examination that you made of the lung tissue, you are speaking about microscopic examination? A. Yes.

Q. And that is all, I take it? A. Yes.

Mr. Taaffe: That is all.

#### Cross-Examination

Mr. Mackey: Q. The inoculation, Doctor, which you made in the cotton rats was for typhus and unusual rickettsial strains? Was that the purpose of your inoculation?

A. Partly; partly because the cotton rat, according to some of our previous experiments, is susceptible to the agent which causes virus pneumonia or primary atypical pneumonia.

(Testimony of Monroe D. Eaton.)

Q. What was in your opinion the result of your inoculation experiments?

A. The result was negative.

Q. And that was the result that you expect to get from a virus pneumonia case?

A. Ordinarily, so far as I know, the agent does not occur in the blood or, if so, only [115] transiently in some forms of virus pneumonia.

Q. Now, I understood you to say that a virus is an organism which is not visible under the microscope; is that correct?

A. That is the definition that is generally used.

Q. A rickettsial body, on the other hand, is a bacterium-like body which may be seen microscopically, is it not?      A. Yes.

Q. And you were not able, were you, to demonstrate any rickettsial bodies in your examination of tissues from Dr. Barr's body?

A. No, we didn't see any. We are not expert at doing that, however.

Q. Now, I believe you are engaged, are you not, in an examination of specimens from a rather large number of cases, fatal cases, that have been reported as those of virus pneumonia?

A. Yes, we have examined specimens from quite a few.

Q. And in which there was no history of any tick bite?      A. Yes.

Q. Did you find the pathology and the specimens from Dr. Barr to differ from those specimens which you examine in the ordinary virus pneumonia fatal case?

(Testimony of Monroe D. Eaton.)

A. Not essentially, no, in this type of rapidly fatal case.

Q. In other words, from your observations and experiments there was nothing which prompted you to believe that the cause of the pneumonia was rickettsial in nature? A. No.

Mr. Mackey: That is all.

### Redirect Examination

Mr. Taaffe: Q. You were looking for rickettsia in the light of the history of the case, is that correct?

A. That is one of the reasons we sent the blood to Dr. Merrill for guinea pig inoculations.

Q. And also one of the reasons why you examined the tissue [116] microscopically; that is correct, isn't it?

A. Well, we were not specifically looking for rickettsia in this case, no.

Q. Did you incidentally look for rickettsia?

A. Well, yes, we always look for bodies in a plasma of this large amount of nuclear cells which you see in the lungs of these cases, either rickettsia or other virus bodies.

Q. With the history of tick bite, had you found rickettsia would you have associated the tick bite with the rickettsia?

A. It would have been a very unusual case, because I do not know of any to my knowledge. There haven't been any cases of Rocky Mountain spotted fever that died in two or three days with a pneumonia of this type.

(Testimony of Monroe D. Eaton.)

Q. Have you read all the history of this subject or a good part of it?

A. Well, I have gone into the question of how frequently pneumonia occurs in rickettsia diseases, yes.

Q. And in rickettsial diseases pneumonia occurs very, very often; that is correct, isn't it?

A. Secondarily after the disease is full-blown.

Q. And, as a matter of fact, the patients die of pneumonia; that is correct, isn't it?

A. Yes, but the pneumonia is not necessarily due to the rickettsial disease. It may be a secondary bacterial infection.

Q. As a result of the invasion of the rickettsia primarily, is that correct?

A. No, I said all pneumonia from which people die following rickettsial infections, like typhus and spotted fever, may be due to bacteria other than rickettsial disease.

The Court: Q. That is generally true, isn't it, that pneumonia germs come in secondarily after the patient is [117] weakened from any number of diseases? A. Exactly, yes.

Mr. Taaffe: Q. By the way, Doctor, am I correct in stating that the infectious tick transmits the rickettsia to the bloodstream of the human being upon which it feeds; is that correct? A. Yes.

Q. And that rickettsia is carried through the bloodstream and lodges someplace in the body; that is correct, isn't it? A. Yes.

(Testimony of Monroe D. Eaton.)

Q. It will usually attack the weakest place; that is correct, isn't it?

A. Well, you are getting into very controversial subjects there on which I would not want to venture an opinion at this time.

Q. As a matter of ordinary common sense to a layman—I am not technical in these matters, as you know—isn't it a fact that a germ will usually attack a weak spot in a human being?

A. Not necessarily.

Mr. Friedman: They have a peculiar affinity for certain parts of the body despite strength or weakness.

Mr. Taaffe: Q. Doesn't the rickettsia have an affinity for the lungs so that in numerous cases where there has been a rickettsial infection pneumonia, either primarily or secondarily, as you say, results? Isn't that true?

Mr. Mackey: He did not say "primarily." I object to that question.

Mr. Taaffe: Let me have the word "primarily" taken out. It secondarily ensues, then?

A. Pneumonia is due to the weakened condition of the patient. I would not say that that is evidence that the rickettsia invades the lungs.

Q. In many of these cases people die of pneumonia, don't they? [118]

A. Quite frequently, yes.

The Court: How do you spell that word "rickettsia"?

(Testimony of Monroe D. Eaton.)

Mr. Taaffe: R-i-c-k-e-t-t-s-i-a. It is named after Dr. Ricketts, who discovered these bodies, if it please your Honor.

The Court: This rickettsia is the description of a body and is the germ of what diseases? Any special diseases?

Mr. Taaffe: Yes, a great many diseases, your Honor.

Mr. Mackey: If the Court please, I think we should have that from a witness rather than counsel. I think it is recognized that there is only one kind.

Mr. Friedman: I think all the Court wants is general information so he will know what is going on.

The Court: Nobody has explained to me what exactly this rickettsia is.

The Witness: It is a class of organisms which causes typhus, various spotted fever that appear all over the world of various types; there is a disease in Australia known as Q fever.

The Court: Q. Do mosquitoes carry some of those?

A. No, they are not carried by mosquitoes. They are usually carried by ticks, lice, fleas.

The Court: That is clear.

Mr. Taaffe: That is all.

The Court: Anything further?

Mr. Mackey: I think he has opened up a new field there on his redirect, and I would like to pursue the matter.



(Testimony of Monroe D. Eaton.)

Recross Examination

Mr. Mackey: Q. Doctor, what is the tissue that rickettsial bodies have a high—I think you fellows call it specificity—for in the human host?

A. Ordinarily it is the vascular endothelium.

[119]

Q. Is that affinity for the blood vessels largely confined to those in the periphery of the body?

A. You mean in the skin?

Q. Well, yes, those, we will say, not the vessels in the skeletal but in the subcutaneous minute blood vessels and arterials.

A. They are usually found in the small blood vessels.

Q. And what do those rickettsial bodies, after they go into that endothelium and smooth muscle cells of the arterials, what if anything do they do pathologically?

A. Well, they generally cause the death of those cells, sometimes a blocking of the vessel.

Q. Is there a proliferation of those cells?

A. Sometimes, yes.

Q. By plugging of that, do you mean the flow of blood through the blood vessel will be stopped?

A. Exactly.

Q. And that would result, in the later stages at least, in the blood vessel bursting and the blood permeating into the tissues. Now, did you have before you to examine such tissues from Dr. Barr, or at least among the tissues that were furnished you by Dr. Carr?

(Testimony of Monroe D. Eaton.)

A. Yes, we had various tissues.

Q. Among others, the endothelium?

A. Well, we had—of course, all the tissues contain blood vessels—I do not recall examining a section of the skin itself, although I believe there was a bruise on the shoulder which was examined by Dr. Carr.

Q. Isn't it a fact that you found any such lesions as you have described as characteristic of rickettsial diseases wholly absent in the specimens you examined?

A. No, we did not see any evidence of such lesion.

Q. You did not—— [120]

Mr. Taaffe: Just a minute. The witness had not finished.

The Witness: I said we did not see any evidence of such lesion in the small blood vessels.

Mr. Mackey: Q. You examined them microscopically? A. Yes.

Q. And the State has good equipment over there for that purpose? A. Yes.

Q. And these virus—I do not know what the plural of “virus” is—— A. Viruses.

Q. You can't see those, can you?

A. Not ordinarily, no. You can sometimes see the results of their action.

Q. You can see the results of their actions, but there is a dispute in the medicinal pathological world, is there not, as to their nature, some people

(Testimony of Monroe D. Eaton.)

saying they are chemical and others saying they are biological in nature?      A. Yes.

Q. And the lesions that you did see were those that you commonly see in virus pneumonia cases, with which there is no suspicion whatever of rickettsial bodies?

A. Well, yes. Commonly we see that type of lesion, although there is one exception which we have to bring up there, and that is the outbreak at the National Institute of Health in Washington, where the rickettsial Q fever did cause pneumonia of this type.

Q. Has any case ever come to your own observation, or have you ever read of any reported case that occurred under natural conditions, where a pneumonia was directly induced by rickettsial bodies?

A. Not under my own observation, no.

Q. And from your reading of the so-called institutional outbreak in Washington to which you referred, is it definitely regarded in the scientific world that rickettsial bodies were conclusively demonstrated to have been the cause of that [121] outbreak, or is it a matter of conjecture as to what did cause it?

A. Well, they were definitely demonstrated in two or three cases.

Q. In two or three of the fifteen cases?

A. I believe, yes.

Q. And the pathology was that of a virus pneumonia?      A. Yes.

(Testimony of Monroe D. Eaton.)

Q. And they were not demonstrated in the balance of the cases, which would be some thirteen or twelve cases, and it is a matter of conjecture as to whether the causative agent in the fifteen cases was rickettsial or virus of the usual kind encountered in the atypical pneumonia?

A. Yes. That is a matter of controversy, I think.

Q. And no such case, to your knowledge, from your reading or experience, has ever occurred outside of the laboratory conditions? A. No.

Q. Do you know, Doctor, of any case where it is reported that a pneumonia was directly induced by a tick bite? A. No, I do not.

Q. Did the institutional outbreak at Washington purport to involve any tick bite of any kind or character?

A. No, there was no evidence that any of these people had been bitten by anything.

Q. And if rickettsia were to be suspected in that institutional outbreak at Washington, it was pretty clear that the only available means of transmission would have been that of inhalation?

A. It was presumed, I think, that that is what had occurred.

Q. In any event, the possibility of transmission by bites from the vector was entirely eliminated by the persons who wrote the articles on the institutional outbreak, was it not?

A. As I recall, from my reading of that article, that was the [122] case.

Mr. Mackey: Nothing further.

(Testimony of Monroe D. Eaton.)

Further Redirect Examination

Mr. Taaffe: Q. There isn't any doubt, is there, medically, Ooctor, that various ticks, including the *Dermacentor andersoni*, *amblyomma* and *Americanum*, carry rickettsia?

A. They may carry rickettsia, yes. They do not all carry rickettsia.

Q. Not all ticks carry it, but those two species carry it, don't they? A. Yes.

Q. That is, some of them do; of the millions of billions of ticks, many of them carry it, isn't that correct?

A. No, I wouldn't say that many of them carry it. Probably a very small percentage of them carry it.

Q. In certain areas many of them carry it, isn't that true?

A. Well, yes. I think, as I recall, in the areas where spotted fever is endemic—in Montana there is about ten per cent that are infected.

Q. And in parts of Idaho, in the Bitter Root Mountains, spotted fever is endemic because of these ticks; that is correct, isn't it? A. Yes.

Q. And in parts of Northern California you have any cases of it also; that is correct, isn't it?

A. Yes.

Q. And Lassen County, California, is within that area; that is correct, isn't it? A. Yes.

Q. Now, if a tick from Lassen County bit a man and caused his death, you would expect to find

(Testimony of Monroe D. Eaton.)

rickettsial-like bodies in the man upon investigation after death; that is correct, isn't it?

A. You should, yes.

Mr. Taaffe: That is all. [123]

### Recross Examination

Mr. Friedman: Q. Doctor, if he died from anything that could be transmitted by a tick, the mere fact that the man died and was bitten by a tick would not convince you that there would be rickettsia-like bodies anywhere?

A. It would be very probable.

Q. That would depend upon what he died from, wouldn't it?

A. Exactly. I mean, the tick—it is conceivable that ticks might carry something other than rickettsia.

The Court: I think, Mr. Friedman, that you misunderstood what the doctor said. He assumed that the man was bitten by a tick that carried these bacteria.

Q. Isn't that right?

A. If the man were bitten by a tick that carried rickettsia, presumably you would be able to see it.

Mr. Friedman: Of course, I understood the question the other way.

Q. If a man was bitten by a tick from Lassen County and died, those facts standing alone would not cause you to look for rickettsia, because he may have died from something that was not caused by the tick at all?



(Testimony of Monroe D. Eaton.)

A. They would cause me to look for rickettsia, but would not cause me to assume that he had died from a rickettsia disease.

The Court: Q. You would have to make the further assumption that every tick in Lassen County did not have this rickettsia.

A. That is what I said.

Mr. Friedman: Q. Do you know what the percentage is in Lassen County of infected ticks?

A. I do not know.

Q. It is lower than the Bitter Root Mountains?

A. As I said, my impression is it is about ten per cent of ticks infected. [124]

Q. Just one more question I want to ask you. You mentioned the fact that inoculation tests could not be made with specimens of blood that had been embalmed, because the bodies were dead.

A. Exactly.

Q. Those bodies, even though dead, can be seen under a microscope, can't they?

A. Yes, rickettsia could be.

The Court: Is there anything else?

Mr. Mackey: I would like to ask the doctor one more question.

Q. Would you expect to find rickettsial bodies or rickettsia-like bodies, or, to put it this way, Doctor, one who was trained in the recognition of rickettsia would have no great difficulty in demonstrating them if they were present; is that not correct?

A. No, they should be able to.

(Testimony of Monroe D. Eaton.)

Q. And if he had a proper specimen and were trained in staining and fixing and in recognition, he would say they were rickettsia or they were not rickettsia?

A. A person well experienced in the recognition of rickettsia should be able to positively identify what he saw as rickettsia.

Q. Did you see any bodies that were rickettsia in the specimens that you examined?

The Court: He has already answered that several times, hasn't he?

The Witness: No, no.

Mr. Mackey: Q. And did you see any bodies that were at all rickettsia-like in those specimens?

A. No, I didn't see anything that would suggest rickettsia to me.

Mr. Mackey: That is all. [125]

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KARL F. MEYER

called for the plaintiff; sworn.

The Clerk: Please state your full name to the Court.

A. Karl F. Meyer.

Direct Examination

Mr. Taaffe: Q. What is your occupation?

A. I am Director of the Hooper Foundation of Medical Research of the University of California. I am Professor of Bacteriology.

(Testimony of Karl F. Meyer.)

Q. You are Professor of Bacteriology?

A. At the University of California.

Q. When you say you are the director, you are the head of the Hooper Foundation, is that correct?

A. Correct.

Q. Will you state briefly what the Hooper Foundation is for the purpose of the record?

A. The Hooper Foundation is primarily a research institute entrusted with investigations into the causes of disease and prevention of disease.

Q. Doctor, did you receive from Drs. Rusk and

A. M. Moody specimens or sections of the lung tissue of Dr. Arthur Barr in June 1942?

A. I saw the sections with them together.

Q. With them together? A. Right.

Q. Did you make an examination of those sections for the purpose of making certain determinations?

A. I was consulted by Dr. Rusk with regard to the interpretation of certain findings in the lung.

Q. And with those doctors, Rusk and Moody, you made the examination, is that correct?

A. I made the examination.

Q. Will you tell us what you did, Doctor, with those specimens and what you found?

A. Well, the specimens were sections prepared by Dr. Rusk. They were stained by means of the hematoxylin-eosin method. The microscopic preparations were [126] mounted on slides and they were put under a biangular microscope and examined and low and high power. I recognized in cer-

(Testimony of Karl F. Meyer.)

tain patches of the lung sacs peculiar bodies which I could not identify with the eosin-hematoxylin stain. Therefore, I requested Dr. Rusk to stain some new sections, which he did. They were stained by means of the Gram stain and by means of the methylene blue and eosin stain.

Mr. Mackey: May I ask the doctor a question?

Q. Doctor, were you present when he stained these tissues?

A. I was not present. The sections were prepared in the laboratory of Dr. Rusk.

Mr. Taaffe: Q. And then brought to you again?

A. And then brought to me again. There were, as I said, in the Gram stains clusters of Gram positive cocci. There were some cells that looked like desquamated epithelial cells, which had peculiar bodies inside of the cytoplasm of these cells, and I said they looked suspiciously like elementary bodies. She insisted upon never using that designation "rickettsial bodies." I said "elementary bodies." I said, "We cannot make any further staining reactions with regard to these bodies," for the simple reason that this was material which had not been fixed in bichloride or in bichromate mixtures. Thus you can't use certain staining procedures. Therefore, the opinion was rendered the findings on the lung were indefinite. There are, however, definite clusters of cocci which any experienced bacteriologist would say they may have been streptococci or they may have been staphylococci, and that is the opinion which I rendered.

(Testimony of Karl F. Meyer.)

Q. A virus cannot be seen under a microscope ordinarily, is that correct?

A. Again from the standpoint of an expert [127] you have got to qualify that.

Q. Go ahead, Doctor, and qualify it.

A. Certain viruses very definitely are corpuscular—I think that is in the definition—they are corpuscular. Consequently, with the proper magnification you certainly can see them, and you can use new methods. You can use fluorescein bicustape by treating it with certain fluorescein dyes, and using some ultra violet lights you can demonstrate it.

Q. These elementary bodies of which you spoke, which you found in the lungs, in those sections or specimens, were bodies other than virus, isn't that correct?

A. You couldn't say that. An elementary body—the term is used to express a corpuscular element which is within the cytoplasm nucleus of a cell. Now, whether that is produced by a virus or is a virus itself, that is naturally a matter which cannot be decided without experimental tests. The microscope in this respect is merely a tool to lead you to certain directions as to what you should do.

Q. Now, what would you expect to find, Doctor, if there were rickettsia present in those specimens?

A. Well, you might find clusters of coccoid, broad-shaped elements, which I want to put in the record are very difficult to stain.

Q. Very difficult to determine?



(Testimony of Karl F. Meyer.)

A. Very difficult to stain and to determine, and you have to use special staining methods to do that. In fact, to be perfectly frank, some people have had extreme difficulties in demonstrating rickettsial bodies in sections—in sections. I insist upon “sections.”

Q. What is the significance of that “in sections,” Doctor?

A. Well, because there are layers upon layers of cells. In other words, instead of having one thin film of cells, you have two or three layers of cells on top of it, because you can only [128] cut two or three.

Q. These elementary bodies that you saw, you say, were in clusters?

A. I said there were elementary bodies in the cytoplasm. I haven't said “clusters.” Some of them, naturally, were in small aggregates.

Q. Aggregates?

A. That would be the term to be used.

Q. If you found rickettsia, you would expect to see them in aggregates, is that correct?

A. Correct, yes.

Q. Were these bodies suspicious—let me withdraw that. Were they rickettsia-like bodies, Doctor, as distinguished from rickettsia?

A. Well, an elementary body in many cases could be said it was rickettsia-like.

Q. Rickettsia-like?

A. Sure, but that is naturally a question of terminology.



(Testimony of Karl F. Meyer.)

Q. In this case, of course, you know the body had been embalmed, don't you? A. Correct.

Q. That added an obstacle to your eventual determinations, isn't that correct? A. Correct.

Q. Could you say in this case, Doctor, considering this tissue had come from a body which had been embalmed, that those bodies which you saw could have been rickettsia, in your opinion?

Mr. Mackey: If the Court please, I object to that question for this reason: The answer calls for mere conjecture. Proof that a certain bacterium might have been present, and which due to inability of methods for recognition cannot be said——

The Court: I do not see how that would aid me in determining the matter.

Q. Could it, Doctor? It could not help the Court in determining this matter for you to tell me if you had used some other method or there had been some other condition it might have been [129] present?

A. If it had been definitely fixed, certainly it could have given a different result. I think embalming was indeed a great disadvantage.

Mr. Taaffe: May I say this for the record: In the literature of experts and people who have had vast experience in this subject, very often reference is made to these bodies as rickettsia-like bodies. Very often, as Dr. Meyer says, it is very difficult to determine, even when you have a perfectly conducive specimen.

The Court: You have established that. The witness has testified to that.

(Testimony of Karl F. Meyer.)

Mr. Taaffe: I simply want to, because of the general aggregate that the doctor speaks of that he has observed, I want to ask the question—which I have a perfect right to do, because we are only dealing with probabilities here—if these could have been rickettsia, these bodies he saw. The law on this subject, if the Court please, we do not have to demonstrate——

The Court: I will allow the question. Can you answer that question, Doctor?

The Witness: I wouldn't commit myself on that, whether they are rickettsia or elementary bodies. You could not commit yourself on a microscopic examination of sections on embalmed material.

Mr. Taaffe: That is exactly the answer I wanted.

Q. In other words, Doctor, they could be rickettsia or they could be other bodies; is that right?

A. You can choose from the two. From the scientific point of view I could not commit myself.

Q. I am not asking you to say they were rickettsia. They could [130] have been one or the other?

A. From the law of probability, yes.

Q. Doctor, did you receive from Dr. Moody a tick?           A. Yes.

Q. In June of 1942?           A. Correct.

Q. Somewhere along about June 8 or 9 or thereabouts?

A. June 8, if I remember correctly.

Q. And what did you do with that tick?

A. The tick was examined by myself, and I sent it over then to Professor Herman in the depart-

(Testimony of Karl F. Meyer.)

ment of entomology of the University of California for final identification. He reported back——

Mr. Mackey: Just a minute. I move to strike the last part of the answer as not responsive. The question is, What did he do with the tick?

The Court: Q. Did you make any examination yourself?

A. I just looked at the tick and saw that it was dead.

The Court: All right; was have got that.

Q. Someone else made an examination at your request? A. At my request.

Mr. Taaffe: Q. You sent the tick to whom?

A. Herman.

Q. Professor William Herman of the University of California? A. Yes.

Q. Did you get a letter back from Dr. Herman?

A. Right.

Q. Have you that letter or a copy of it?

A. I have merely a copy of the note which I sent to Dr. Moody.

Q. May I see that?

In the interest of saving time, have you any objection to introducing that?

Mr. Mackey: Yes, I think the person to identify this tick is Dr. Herman.

The Court: Are you going to have him as a witness? [131]

Mr. Taaffe: I have him under subpoena, yes.

The Court: Do we need to go into that any further?

(Testimony of Karl F. Meyer.)

Mr. Taaffe: Yes, I think this matter of the letter will be cleared up when Dr. Herman is called.

Mr. Mackey: We object to any testimony from the witness to the effect that Professor Herman——

Mr. Taaffe: There is no question pending.

The Court: I do not know what counsel is going to ask.

Mr. Taaffe: I think that is all, Doctor.

The Court: Any questions?

### Cross Examination

Mr. Mackey: Q. As I understand your conclusion, Doctor, it is that you cannot say that the elementary bodies which you saw were rickettsia?

A. That is correct.

Q. And you cannot say what else they might have been? A. That is correct.

Q. It is a fact that they might have been any one of numerous or perhaps we might say innumerable other things? A. That is correct.

Q. And they might have been any of a number of things which we see in the usual case of virus pneumonia where there is no suspicion or where there is no history of a tick bite?

A. That is correct.

Mr. Mackey: That is all. Thank you.

Mr. Taaffe: That is all.

The Court: I think I will take an adjournment at this time until tomorrow morning at ten o'clock, gentlemen.

(Whereupon an adjournment was taken until Wednesday, November 3, 1943, at 10:00 a.m.)

Wednesday, November 3, 1943

10:00 A.M.

The Clerk: Barr v. Travelers Insurance Company; Barr v. Equitable Insurance Company.

Mr. Taaffe: I desire to put a very short witness on at this time, if your Honor please.

KEITH R. FERGUSON

called for the plaintiff; sworn.

The Clerk: Please state your full name to the Court.

A. Keith R. Ferguson.

Direct Examination

Mr. Taaffe: Q. Your name is Keith R. Ferguson, is that correct?

A. That is correct.

Q. And you are at the present time and for some period of time you have been a lieutenant commander in the United States Navy; is that correct?

A. That is correct.

Q. Prior to your enlistment in the United States Navy you were a practicing attorney in the City and County of San Francisco, State of California; is that correct?

A. That is correct.

Q. Entitled, of course, to practice your profession in all the courts of this State; is that right?

A. That is correct.

Q. And so entitled for many years last past, is that true?

A. That is correct.

Q. Commander Ferguson, you were related to the deceased, Arthur Barr, were you not?

A. I was his brother-in-law.



(Testimony of Keith R. Ferguson.)

Q. Mrs. Ferguson was a sister of Arthur Barr; is that right?      A. That is correct.

Q. You are one of the attorneys of record herein, is that true?      A. That is correct. [133]

Q. Do you recall the day of the autopsy or the fact that an autopsy was performed in the Keaton Funeral Parlors on the remains of Arthur Barr?

A. It was in September of—no, not September—

Q. On or about June 9, 1942?

A. June 9, that is correct, 1942.

Q. Were you present at the autopsy?

A. I was there in the building. I was not present when the body was—

Q. On that day did you receive any object from Mrs. Zeila Barr, the widow of Arthur Barr?

A. I did.

Q. What was that object?

A. It was a tick.

Q. You are familiar with what ticks are, I take it?

A. Well, I have seen quite a few while I was hunting.

Q. What did you do with that tick?

A. I delivered it to Dr. Moody.

Q. Dr. A. M. Moody?

A. That is correct.

Q. The gentleman who sits directly behind me at the counsel table; is that so?

A. That is correct.

Mr. Taaffe: I take it it won't be necessary to ask any questions of Mr. Ferguson concerning the



(Testimony of Keith R. Ferguson.)

insurance policies, the delivery of the Equitable policies delivered by Mr. Ferguson.

Mr. Mackey: We so stipulated; it was in force and in effect.

Mr. Taaffe: And similarly, I take it, Mr. Friedman, the presentation of claims by Mr. Ferguson and the like of that will be stipulated?

Mr. Friedman: We have made the same stipulation.

Mr. Taaffe: That is all.

Mr. Mackey: No questions, your Honor. [134]

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ADELBERT M. MOODY

called for the plaintiff; sworn.

The Clerk: Please state your full name to the Court.

A. My name is Moody, and the initials are A. M.—Adelbert M.

Direct Examination

Mr. Taaffe: Q. What is your profession, Doctor?

A. I am a physician and specialize in pathology.

Q. You are a graduate of what college?

A. Rush Medical College.

Q. Located where? A. In Chicago.

Q. In what year did you graduate?

A. 1910.

Q. Will you speak up, Doctor, sufficiently loud so that counsel at the other table can hear you?

(Testimony of Adelbert M. Moody.)

A. 1910.

Q. How long have you been specializing in pathology, Doctor?

A. Well, since I finished my internship in April 1912.

Q. Has your entire professional life been devoted to the specialty of pathology?

A. Well, with a few exceptions, yes.

Q. Of course, you are entitled to practice your profession in the State of California and are licensed so to do; is that correct? A. Yes.

Q. In your profession as a pathologist or specialty as a pathologist have you held any official positions?

A. In the Government, the City and County. I was pathologist of the City and County of San Francisco at one time.

Q. For how many years?

A. Four and a half years.

Q. Attached to the Coroner's office, is that correct? A. Yes, sir.

Q. In your capacity as such pathologist for the Coroner or for the City and County of San Francisco, were you called upon [135] on many occasions to make pathological determinations?

A. I was.

Q. Many thousands of times?

A. Well, I wouldn't go so far as to say many thousands.

Q. A few thousand times, to put it that way?

A. Yes.

(Testimony of Adelbert M. Moody.)

Q. Have you been connected with any hospitals in San Francisco, say, in your capacity as pathologist?

A. Yes, I was pathologist at the St. Francis Hospital.

Q. For how long?

A. Well, for a little better than fifteen years.

Q. Are you now the pathologist at any hospital in San Francisco?

A. Yes, at St. Mary's Hospital and for the Southern Pacific.

Q. Doctor, in your capacity as pathologist were you present at an autopsy performed upon the body of Dr. Arthur Barr at Keaton's Mortuary in San Rafael on June 9, I believe the date to have been, 1942?

A. I was.

Q. What other persons were present at that time?

A. Well, Dr. Berger performed the autopsy, and Dr. Rusk and Dr. Carr and myself were there as pathologists also.

Q. The Dr. Berger whom you mentioned is Dr. A. A. Berger, is that correct?

A. That is correct.

Q. Dr. A. A. Berger is now commander in the United States Navy stationed overseas, is that correct?

A. Well, he is in the service. I do not know just what his station is or where he is.

Mr. Taaffe: Will you stipulate he is overseas? I have inquired and I can tell you the exact place.

(Testimony of Adelbert M. Moody.)

Mr. Friedman: He is not available, anyway. I don't know where he is.

Mr. Taaffe: I can describe it generally as being Oceania. [136]

The Court: Counsel has stipulated he is not available. He is in the service.

Mr. Taaffe: Q. Doctor, you were present representing the plaintiffs in these actions; that is correct, is it not? A. That is correct.

Q. Representing the widow and the minor children; that is true, isn't it?

A. Well, I was really indirectly representing them, but I was asked by Dr. Berger to come and handle certain portions of the examination for him.

Q. That autopsy was performed by Dr. Berger in the presence of those other medical men we have mentioned, is that correct?

A. That is correct. The attending physician was there also.

Q. Dr. Homer Marston, is that correct?

A. Yes, that is correct.

Q. You observed the autopsy, is that true?

A. That is correct.

Q. Upon its completion, or in the course of the autopsy you took certain specimens, sections, and the like; is that correct? A. That is correct.

Q. Did you observe the condition of the lungs visually at the time of the autopsy?

A. Well, yes, to some extent.

Q. Would you describe your visual observations at that time?

(Testimony of Adelbert M. Moody.)

A. Well, I made no special note of the gross appearance of the lungs. I do remember that they were quite edematous and irregularly hemorrhagic, and there was some consolidation in both bases, as I remember it.

Q. What is a consolidation, Doctor?

A. Well, it means an inflammatory reaction which increases the resistance of the particular part where it is inflamed.

Q. At the time that the autopsy was performed was it evident that the body had been previously embalmed?

A. Yes, the [137] body had been embalmed very definitely.

Q. Will you state what sections, specimens, you availed yourself of for the purpose of further determinations?

A. Well, I had a large portion of the brain and I had a piece of skin; I had sections of lungs, heart, lymph glands, liver, spleen, kidneys, adrenals, seminal vesicles, testes, blood vessels—I think that I had portions of all the tissues. They were divided equally between the three of us. At least, Dr. Berger, who did the autopsy, would distribute a sample of each specimen to each of the three of us, Dr. Rusk, Dr. Carr and myself.

Q. Did you pursue your investigation of those specimens at a later time, Doctor? A. I did.

Q. In your own laboratories, is that correct?

A. That is correct.

(Testimony of Adelbert M. Moody.)

Q. Did you make your further investigations for the purpose of discovering the presence of any significant bodies?

A. Well, yes. I made an attempt to find them.

Q. An attempt to?           A. Yes.

Q. Does the fact that an autopsy, or, rather, that an embalming had occurred previously place an obstacle in the way of those determinations?

A. Well, I think so, yes.

Q. In other words, do you feel or is it your opinion that had the autopsy been performed and the sections or specimens taken prior to embalming that more conclusive determinations might have been made?           A. That is correct.

Q. Did you make an investigation, Doctor, of the specimens or sections mentioned with a view to ascertaining the presence of rickettsia?

A. I did.

Q. Did you find any bodies which might have been rickettsia? [138]

Mr. Mackey: I object to that, your Honor, as improper, irrelevant and immaterial.

Mr. Friedman: I will further object on the ground it calls for the opinion and conclusion of the witness, a mere matter of conjecture. He can tell what he found.

Mr. Taaffe: And he can name what he found. He is an expert witness, if it please your Honor. He has a right to say whether bodies were——

The Court: Well, I think you would have to lay



(Testimony of Adelbert M. Moody.)

the foundation. He would have to testify what he found, first.

Mr. Taaffe: Q. Did you find certain bodies, Doctor, of significance?

A. Well, I do not know whether they are of any significance or not. I found what I thought was one mass of annucleation bodies in the section of the lungs, but that is the only place.

Q. In the sections of lungs? A. Yes.

Q. What was the appearance of those bodies? Were they in clusters or aggregates?

A. Yes, they were included in a fairly large cell with Gimsa stain. They stain green. There was a whole group of very fine bodies that I was unable to identify. I made a search to see if I could find any others resembling them, but I could not.

Q. Might those bodies which you have described and which you found in clusters or aggregates been rickettsia?

Mr. Mackey: Your Honor, I object to that as entirely speculative, probative in no respect whatsoever.

Mr. Friedman: He has already stated he could not identify them.

Mr. Taaffe: For that very reason I have asked the witness whether they might have been one type of body or another type; [139] in other words, if they might have been that type of body. it is possible they come within that classification. Once more counsel are confused with the rule that is

(Testimony of Adelbert M. Moody.)

applicable in these cases, if it please your Honor. We are not required to prove anything conclusively or to the point that it is incontestible. All we are concerned with—and that is the purport of the decisions, and they so state in so many words—we must prove the probabilities. That is the burden that rests upon us. The Circuit Court of this very circuit has said that is the rule in cases of this kind, if it please your Honor—I do not mean in tick cases, but I mean in medical cases of this kind.

The Court: Is it your contention that it is competent to prove probabilities and then doesn't the question arise, having done that, is that competent evidence? Does it prove anything after you have done it?

Mr. Taaffe: Yes.

(Discussion between Court and counsel on the objection.)

The Court: Let the witness answer the question. I will overrule the objection. So the record may be clear on it, the record may show at this point I do not believe any weight attaches to an answer based upon probability of that kind. Counsel may have his point in the record.

Mr. Friedman: May the record show the Travelers Insurance Company has made the same objection?

The Court: Yes.

Mr. Mackey: May I make a brief observation? It must be obvious to your Honor that the two cases cited by counsel refute his position here.

(Testimony of Adelbert M. Moody.)

The Court: I am inclined to think so, but we have had this discussion, and so that counsel for the plaintiff may have [140] his matter in the record, I will overrule the objection subject to the comment the Court has made, and it will be very evident in the record as to the basis of the ruling.

Q. Now, after all this, do you still have the question in mind?

A. If I may answer it in my own way.

Mr. Taaffe: May we have the question read?

The Witness: I think I understand the question.

The Court: Do you wish to reframe the question, Mr. Taaffe, or let the reporter read it?

Mr. Taaffe: I will reframe the question.

Q. Could those bodies which you have described—and it is my recollection that those were the bodies in clusters that stained green under the Gimsa stain—have been rickettsial bodies?

A. I really do not know whether they could or not, but it was my impression that what rickettsial bodies should look like were not like the bodies I saw.

Q. By the way, Doctor, in all your experience in the Coroner's office in San Francisco with some few thousand cases, in all your experience in St. Mary's Hospital as pathologist there, in all your experience in the St. Francis Hospital as the pathologist there, have you ever come in contact with a case involving death due to rickettsial bodies?

Mr. Friedman: May I ask whether counsel is

(Testimony of Adelbert M. Moody.)

now going to impeach this witness because he did not like the answer?

Mr. Taaffe: No, that is not the purpose. I will state what the purpose is. I want to show it is a disease that is rare in this locality. Doctors are unfamiliar and unacquainted with it generally. I want to show that it is a disease that is localized to the areas where the tick exists of that kind, and it is brought into other communities, and so on. [141]

The Court: That may be so. I think the objection is good. I will sustain it.

Mr. Taaffe: For the purpose of the record, I offer to show by this doctor that this is a rare disease, except in localities where ticks which are contaminated with various types of disease are inhabitants of that region.

The Court: I think counsel will probably all agree with you on that statement.

Mr. Friedman: I do not think there is any question that not the disease of which Mr. Barr died but the disease produced by an infected tick, of course, is more prevalent in counties that have ticks than it is in metropolitan area where we have no ticks.

The Court: I think that would be a reasonable assumption.

Mr. Taaffe: I want to show not only it is more prevalent—that is a matter of comparison and degree—I want to show it is practically non-existent; that a case never existed hardly in San Francisco. I will go further and include a question of this type which I had not contemplated, and ask him if he

(Testimony of Adelbert M. Moody.)

ever heard of a case in San Francisco or in this region before this time.

The Court: I rather think what you are doing is not so good for your own case.

Mr. Taaffe: I want to show that if doctors are uncertain—when a doctor like Dr. Eaton says a thing might have been something or it might not have been something—the rarity of the disease has an influence, and I think the Court would be interested in knowing if it is a common disease that could be easily recognized, the Court might conclude the mere fact that there is uncertainty—— [142]

The Court: You have asked this witness what his opinion was as to whether this could have been this type of body, and he gave a certain answer to that that would indicate he did not think they were. Now you want to cross-examine him to show that the thing was there and he did not have any experience along that line?

Mr. Taaffe: It isn't on account of that question. Suppose I put this latter question before the other; wouldn't it have been perfectly proper? Suppose before I asked him if they were rickettsia-like bodies I asked him, "Are rickettsial disease rare in this locality?" Would there have been any objection that I was cross-examining my own witness? The mere fact that it follows after the last answer does not have any bearing, I submit, if it please your Honor.

The Court: I think the objection is good. I will



(Testimony of Adelbert M. Moody.)

sustain it. You have made your offer of proof, so the record is clear on that.

I think perhaps it might be advisable after all this discussion to take a brief recess at this time.

(Recess.)

Mr. Taaffe: Q. Doctor, did you make an examination of the brain? A. I did.

Q. Will you state what your examination of the brain revealed?

A. Well, I found some active inflammation of the coverings of the brain which would be termed leptomeningitis, and that was associated with some edema, that is, free fluid in the coverings of the brain, and also some rather chronic thickening of the leptomeninges, especially in the region of the Sylvian fissure on the left side of the brain, which I had for examination. I found no changes of any note elsewhere in the [143] brain except in the third ventricle, where there was a cyst which was apparently of a congenital nature and incidental, I thought, to the present illness.

Q. Did it have any relationship to the present illness? A. I thought not.

Q.. This last condition that you mentioned?

A. Yes.

Q. Were there any other significant matters that you saw in the connection with the brain conditions?

A. No.

Q. Are any of those conditions which you found in the brain, Doctor, associated with Rocky Mountain spotted fever cases?



(Testimony of Adelbert M. Moody.)

A. Well, it is my understanding that a certain percentage of Rocky Mountain spotted fever cases do have leptomeningitis and also some changes within the brain itself, particularly the brain stem and the cerebellum, which were not present in this case.

Q. The leptomeningitis was present?

A. That is right.

Q. And that is associated, then, with Rocky Mountain spotted fever cases, is that true?

A. According to reports I have read, yes.

Q. Did you make an examination of the spleen, Doctor?      A. I did.

Q. Will you state what the conditions were that you found?

A. That the blood sinuses of the spleen were greatly engorged with blood, and there was a relatively small amount of lymphoid tissue present, probably as a result of the increased amount of blood in the spleen, and there were some evidences of inflammation there, but I found no destruction of blood vessels nor areas of necrosis in the spleen, that is, death of splenic pulp tissue.

Q. And is the engorgement of the spleen of which you speak also [144] associated with Rocky Mountain spotted fever cases?

A. Well, you are very apt to have an engorgement of a spleen as a result of an internal vascular collapse.

Q. In Rocky Mountain spotted fever?

A. In Rocky Mountain spotted fever as well as other things.

(Testimony of Adelbert M. Moody.)

Q. Did you find a condition of the lungs which might be characterized as bronchial pneumonia?

A. Well, I would call it an atypical type of pneumonia.

Q. What is "atypical" as distinguished from "typical"?

A. This particular case had purulent bronchitis, that is, there was pus present in the bronchi and in the bronchials, associated with some areas of both of the mucosa of the bronchi and wall with regional involvement of the lung, irregular, patchy consolidation where the alveoli contained leucocytes of various types of small numbers, and in other areas the alveoli filled with fluid as well, and some of them contained evidence of hemorrhage both within the air sacs and also within the walls of the air sacs.

Q. Is bronchial pneumonia, Doctor, associated with Rocky Mountain spotted fever?

A. It has been reported, yes.

Q. Upon the autopsy did you notice any petechial spots on the body of Dr. Barr?

A. I made a notation of five small spots in the upper part of the left arm, I believe it was, adjacent to the—well, in about this region (indicating) in line with the anterior fold of the axillary. I suppose, that is, this space here—I should say it was about in this region.

Q. That is, in the forward part of the arm just below the shoulder joint, is that correct?

A. That is right.

(Testimony of Adelbert M. Moody.)

Q. Were those spots what might be characterized medically as petechial spots?

A. Well, that is what I judge, but in the [145] sections which I had I did not see any blood in the section of the portion of skin that I had.

Q. But you did notice those on the arm of the deceased at the time of the autopsy?

A. That is right.

Q. Now, are petechial spots common to Rocky Mountain spotted fever?

A. Yes, it is my understanding that they are.

Q. What was the heart condition, as you observed it, Doctor?

A. Well, I found an occasional small scar in the portion of the heart that I examined and some edema, that is fluid between the muscle bundles separating them a little bit. But, as I recall, there was nothing else of any particular interest in there. I think the blood vessels were normal.

Q. Doctor, in your examination of the lungs did you find some small necrosing lesions?

A. Oh, yes.

Q. Are such lesions associated with Rocky Mountain spotted fever, necrosing lesions?

A. Well, yes, necrosing lesions are, but they usually involve the blood vessels—that is my understanding—and then secondarily there are degenerations in the tissue supplied by those blood vessels.

Q. Did you make an examination of the liver, Doctor?      A. I did.

(Testimony of Adelbert M. Moody.)

Q. Will you state what conditions you found in the liver.

A. Well, I found acute fatty changes in the liver cells, which are toxic in type, plus a small amount of fatty infiltration in the liver. There was a low-grade, slight parenchymatous hepatitis as evidenced by a slight round cell infiltration to the vessels in the perialveolar region; and there was also a considerable amount of post mortem change in this liver as well.

Q. Changes that occurred after death?

A. I judge so, [146] because I found a large part of Gram positive bacteria, which are ordinarily associated as a secondary invader following death, present in these areas.

Q. Were any of these conditions, except, of course, the post mortem conditions, which you found in the liver associated with Rocky Mountain spotted fever?

A. Well, there is reported some changes in the liver, in certain cases, similar to but ordinarily more extensive than I found in this case.

Q. Doctor, where a man contracts Rocky Mountain spotted fever, and where the onset is rather sudden and he dies within two or three days after the onset, is it not a fact that sometimes in cases of such swift development you do not find many of the signs that you otherwise would ordinarily?

A. That is true, I think.

Q. As a matter of fact, Doctor, in many cases of Rocky Mountain spotted fever where the onset

(Testimony of Adelbert M. Moody.)

is sudden and death is swift and ensuing within two or three days, you very often do not find even extensive macular rash, is that correct?

A. You understand, I have never seen a case of Rocky Mountain spotted fever, that is, to recognize it as such, and so I do not believe I am competent to answer that particular phase of the question, although I do know from what I have read that there is a variation in the type of spots that one finds, depending upon the length of time of the illness and the severity of the illness. But it is my impression that in very acutely ill and fulminating cases one might expect to find large hemorrhagic spots rather than small petechiae or macular eruptions.

Q. What do those large spots look like, Doctor, according to the literature?

A. They would look like bruises. [147]

Q. Are they sometimes described as of the appearance of measles?

A. Well, yes, spots have been described as having the appearance of measles, but I thought you were mentioning the large hemorrhagic spots. That would not look like measles.

Q. That would not; that would look like a bruise. I am speaking now of some of these macular spots or rashes.

A. Oh, yes.

Q. They look, in Rocky Mountain spotted fever, do they, or are they reported to look in medical science like measles very often?

A. Yes, I understand so.



(Testimony of Adelbert M. Moody.)

Q. Did you examine the adrenal glands, Doctor?

A. I did.

A. As I recall, there were small areas of round cell infiltration in the capsule of the adrenal, and that the cortical substance, cortical cells, rather, contained a relatively small amount of lipoid, not the normal amount.

Q. What is lipoid, Doctor?

A. It is a fatty substance.

Q. Is there anything in those glands which is associated with Rocky Mountain spotted fever?

A. Well, not that I could say and be sure about, no.

Q. Did you examine the kidneys?

A. I did.

Q. What did you find there?

A. Well, I found a moderate increase in the amount of blood in the kidney. The kidney cells were slightly swollen and cloudy, and I believe I also found just an occasional fibrous glomerulus, which is not uncommon in a person of this age. The swelling of the kidney could be associated with any acute infection as a result of the toxic effect of the infection regardless of its cause.

Q. Its origin?           A. Yes.

Q. Whether it was Rocky Mountain spotted fever or some other [148] type of case, is that it?

A. That is right.

Q. Doctor, did you receive at the time of the autopsy on June 9, 1942 from Lieutenant Comman-



(Testimony of Adelbert M. Moody.)

der, I think, Ferguson, who preceded you on the witness stand in this case, a tick?

A. I did.

Q. What did you do with that tick?

A. I acted as a messenger with it and took it to Dr. Karl Meyer of the University of California.

Mr. Taaffe: I think that is all.

### Cross Examination

Mr. Mackey: Q. Did you in your gross examination notice the size of the spleen?

A. Well, I did not make any record of the size of the spleen at all. As a matter of fact, I made very few records of gross material, because Dr. Berger was looking out for that part.

Q. You have no recollection of noting any pronounced enlargement of the spleen?

A. No, as I recall it, it was not unduly enlarged; maybe slightly so.

Q. Isn't it a fact, Doctor, that in spotted fever fatal cases, particularly in those of Western origin and those of early fatality, that the disease is accompanied by a very pronounced enlargement of the spleen?

A. Well, it is my understanding that it would be easily palpable by the common method and I do not believe this spleen was large enough to be felt.

Q. You say you diagnosed the cause of death as bronchial pneumonia?

A. Instead of calling it a bronchial pneumonia I called it an atypical pneumonia of a virus type.

(Testimony of Adelbert M. Moody.)

Q. In your practice do you have quite a number of atypical pneumonia cases of various types under observation?

A. Not a great many. I have seen some, however. [149]

Q. Have you seen quite a few of those cases during the past few years?

A. Yes, I have.

Q. Have any of those cases been fatal cases?

A. Oh, yes.

Q. And have any of those fatal cases been swift, fulminating and of short duration?

A. Oh, yes, they may die very quickly.

Q. As quickly as three days from onset?

A. Oh, yes.

Q. And even more quickly than that, Doctor?

A. Yes.

Q. And within the realm of your own experience, in San Francisco, may death occur within forty-eight hours, even, of onset?

A. Well, yes, it may. As a matter of fact, I have seen death of that type that occurred—of course, I saw many during the last—the flu epidemic of 1916, 1917 and 1918, and many of those dies in less than twenty-four hours from the recognized onset.

Q. And was Dr. Barr's death, as revealed by your examination, similar to the pathology of these early fatal pneumonia cases to which you have just referred?

A. Yes, I think so.

(Testimony of Adelbert M. Moody.)

Q. Were there any respects, with respect to the microscopic pathology in Dr. Barr's case, that differed from the pathology in the atypical virus pneumonia of which you have spoken?

A. No, I don't think so.

Q. Now, you spoke of a condition which you found in quite a number of organs which, in answer to the somewhat leading questions of counsel, were associated with Rocky Mountain spotted fever. You reviewed, I think, an infiltration into the leptomeninges, and you said it was your understanding that that frequently accompanied a spotted fever case.

A. That is right.

Q. Now, it is equally true that it frequently accompanies most [150] any infection that results in death; is that not so, Doctor? I mean any respiratory infection such as the type that you saw?

A. Not uncommon, particularly the atypical type of pneumonia.

Q. You would not say simply because a man has an infiltration such as you found in Dr. Barr's leptomeninges that that was any indication that he died of spotted fever, is it?

A. Oh, no.

Q. And isn't that same thing true with respect to the various organs in which you found pathological evidence, that the evidence that you found there was what you would find and expect to find in an atypical virus pneumonia?

A. That is right.

Q. You say according to your reading, a pete-

(Testimony of Adelbert M. Moody.)

chial rash frequently is associated with spotted fever cases, did you not?

A. Yes, that is right.

Q. As a matter of fact, Doctor, isn't that a most common clinical sign of the disease that is known as Rocky Mountain spotted fever?

A. It is my understanding that that is the reason it is called spotted fever.

Q. Did you ever read in any text whatever or in the report of any case that was known to have been spotted fever of the appearance of a rash, either petechial or macular or otherwise, at a date earlier than the onset of the fever?

A. Well, yes, I think that—I can't answer that as regards the relationship to the fever, but my impression is that there are frequent cases reported in which the spots are the first things that are noticed.

Q. Even before the patient becomes ill?

A. No, I think that the patient is feeling a little bit below par beforehand and spots may not appear for a couple of days after he is feeling poorly; but I imagine the spots are the things that [151] attracted attention to some extent.

Q. There has been testimony in this case, Doctor, to the effect that a tick was seen in the skin in the region of the decedent's navel while he was alive on the 31st of May at about one or two p.m., and that at about nine o'clock of the same evening the same witness saw a rash which resembled that

(Testimony of Adelbert M. Moody.)

of measles on the wrists and arm of Dr. Barr. I think you may consider that the onset in Dr. Barr's fatal illness was not earlier than the afternoon of June 4. Is that correct, Mr. Taaffe?

Mr. Taaffe: That is right—not the afternoon; it was the morning the doctor was called in.

Mr. Friedman: June 4.

Mr. Taaffe: Not, the onset was——

Mr. Mackey: June 3.

Mr. Taaffe: No, the onset was June 3. He came home about six o'clock at night and did not eat his supper and had a fever.

The Court: That is what I recall. The testimony shows that that evening he went to bed, his face was flushed, and he was ill.

Mr. Mackey: He went to Dr. Briggs on the 2nd, he worked on the 3rd——

Mr. Taaffe: It was the evening of the 4th, about six o'clock.

Mr. Mackey: Then the statement was correct.

Mr. Taaffe: Yes, that is correct.

Mr. Mackey: Q. Under those circumstances would the appearance of a rash some four days before the onset of the fever—would that, from your reading concerning the disease and your pathological studies, indicate to you that that was [152] any indication of a spotted fever infection?

A. From that particular tick?

Q. Well, no, I will say from any tick. In other words——



(Testimony of Adelbert M. Moody.)

Mr. Taaffe: Let the witness answer the question, please.

Mr. Mackey: Let me put it more simply.

Mr. Taaffe: Let him answer the question. It was a question he was in the process of answering.

Mr. Mackey: Not at all, Mr. Taaffe. Proceed, Doctor.

A. As I understand your question, he had this rash the same evening he was bitten by the tick?

The Court: Counsel wants to eliminate that from his question. He apparently wants you to answer it on the basis of the fact that the rash appeared several days before the man felt ill.

Mr. Mackey: At least the first complaints or before the onset.

The Witness: Your idea is you want to know if I think that that was spotted fever at that time?

Mr. Mackey: No, I am not asking you that.

The Court: You had better reframe it.

Mr. Mackey: Q. From your reading concerning the appearance of rashes that are characteristic of spotted fever, are you of the opinion that such rashes appear as early as four days prior to the onset?

A. No.

Q. That is, you never heard of such a rash appearing? A. No.

Q. You are familiar with the pathology of rickettsial diseases generally, are you not, Doctor?

A. Yes, to some extent, yes.

Q. In a pathological examination, where the object in view is to determine whether or not a de-



(Testimony of Adelbert M. Moody.)

cedent died of a rickettsial [153] disease, there are two avenues of microscopic investigation, are there not, consisting, first, we will say, of searching for, finding, and recognizing rickettsial bodies themselves, and, second, in searching for microscopically and recognizing the lesions in the body which rickettsial bodies generally cause; is that correct, Doctor?

A. That is right.

Q. Did you make that dual type of examination in this case?

A. I did.

Q. You have had considerable experience, I assume, in the field of rickettsial diseases generally? You have examined specimens in typhus cases?

A. I have seen rickettsia organisms from typhus cases, and I have been interested particularly in blood vessel changes, the late changes that may occur following typhus.

Q. It is generally the fact that the pathology of rickettsial diseases, whether they be typhus, spotted fever, or that almost unpronounceable tropical disease—perhaps you can help me there——

A. I can't.

Q. The characteristic pathology in all those cases is a condition of the blood vessels?

A. That is right.

Q. And a rickettsial body is a minute bacterium-like organism which lives and multiplies only in living cells?

A. That is right.

Q. And it is not filterable?

A. That is my understanding.

(Testimony of Adelbert M. Moody.)

Q. And it has a very high specificity for certain tissues? A. Yes.

Q. So when we are looking for it we may safely say if it is in the body it is going to be present in certain effective tissues and it is not from the non-infective tissues; is that [154] correct?

A. Yes.

Q. And in the human host the rickettsial body goes into the blood cell of the endothelium—that is true of typhus and Rocky Mountain spotted fever, is it not?

A. It goes into the endothelium cells of the blood vessels.

Q. The endothelium is the innermost lining of the blood vessel? A. That is right.

Q. And while typhus just invades the cytoplasm of the cell, the rickettsia of spotted fever invade the cytoplasm but sparsely and you find them in contact colonies in the nucleus of the cells that you have just mentioned?

A. It is my understanding that there is a difference between some of the varieties which cause the different forms of Rocky Mountain spotted fever, and in which some of them are found in the cytoplasm alone and some in the cytoplasm and nuclear material.

Q. But in any event, it is in the cells of the endothelium and possibly the cells of the smooth muscles of the arterials that you expect to find rickettsial bodies if they are present?

(Testimony of Adelbert M. Moody.)

A. Yes, they apparently involve the entire wall of the smaller blood vessels.

Q. And are those the blood vessels of any particular portion of the body that are generally involved?

A. No, they may involve blood vessels of any part of the body; that is my understanding.

Q. What do those rickettsia, if pathogenic, do in those blood cells?

A. Apparently they cause a destruction of the cells themselves.

Q. And the first stage of that destruction is a proliferation, is it not, or a multiplication of the cells?

A. That is right. [155]

Q. And while the disease progresses it results in an occlusion of the blood vessel or seepage?

A. Well, because of the destruction of the cells there, the blood will naturally clot in that area and will cause thrombosis.

Q. And, I suppose, when there is a thrombosis, why, then there is a seepage of blood through the tissues or lymph ducts to the surface of the body or through the surface of the skin?

A. I think the hemorrhage comes from the surrounding vessels, or there may be an increased permeability in all the vessels allowing red blood cells to escape.

Q. Would that be the explanation—the thrombosis and the subsequent escape of the blood—of the petechial rashes?

(Testimony of Adelbert M. Moody.)

A. Partly so, but you may get petechial rashes without actual destruction of the lining of the capillaries.

Q. That is, without the increases?

A. That is right, without any visible increases demonstrable.

Q. It is usual to find that blood vessel condition, which I assume is an acute specific condition—that is correct, is it not, Doctor?

A. No, there are other things besides typhus that may produce that destruction of blood vessels.

Q. But it is common to find that blood vessel condition in the peripheral blood vessels?

A. Yes.

Q. Now, do I understand correctly that you made an examination microscopically for the presence of any of those lesions in the blood vessels of Dr. Barr?      A. I did.

Q. And what was the result of your finding in that respect?

A. Well, on the whole the blood vessels were negative as regards pathology of that nature. There were some changes in the aorta, but I rather felt that they were associated with an arteriosclerosis rather than to an acute infection. [156]

Q. In other words, your finding was in effect, Doctor, that this man did not have the blood vessel condition that is common to Rocky Mountain spotted fever?      A. That is right.

Q. Now, you have already testified, I believe, on

(Testimony of Adelbert M. Moody.)

direct examination that you also found microscopically—that you did not find or recognize any rickettsial bodies in Dr. Barr's——

A. I saw nothing that looked to me like rickettsial bodies.

Q. Let me ask you this: Isn't it a fact that virus pneumonia of the type that you say Dr. Barr's resembled, that they frequently fail to show any clinical sign until the onset of the fever?

A. Well, no. I am not sure of that point at all.

Q. Do you entertain any opinion on that point?

A. Well, not having seen a case, I really do not know. But if the temperature were taken when the man was feeling a little ill, he might have had an increase, but I do not know whether he did or not.

Q. Perhaps I have not made myself clear, Doctor. The common case of virus pneumonia presents an onset with a picture by X-ray of a lung condition which antedates any of the usual chest or respiratory complaints on the part of the patient?

A. Well, I do not know that that is true, no. I think in the cases I have contacted the patients are much sicker, apparently, than the X-ray would lead one to believe. That is my opinion of the virus pneumonia. And the physical findings on that chest may not reveal anything in the lung at all and yet the patient is extremely ill.

Q. In other words, if a patient had an onset on June 4 and had been, as the testimony in this case shows, examined by a physician on June 2 with a stethoscope examination revealing no rales or other



(Testimony of Adelbert M. Moody.)

sign of a respiratory disorder, that would [157] be wholly consistent with an onset of virus pneumonia some two days later, would it not?

A. Oh, yes.

Q. In other words, the clinical manifestations, or perhaps I might say prodromal manifestations, look behind the chest condition?

A. The actual chest condition?

Q. Yes, the actual chest condition, as, we will say, revealed by an X-ray.

A. Yes, that is correct.

Q. Now, these elementary bodies that you saw were the same bodies that you see in the usual atypical pneumonia of a virus nature, were they not?

A. Well, I really do not know what those bodies were, but they suggested to me to be bodies similar to what I found in former cases of virus pneumonia which I had examined. But for that reason I took the slide over to have Drs. Karl Meyer and Eaton to look at it, and they did not give me any very definite answer either.

Q. We have had the testimony of both of those gentlemen in the record in this case. From the sum and substance of your examination, your pathological examination in this case, Doctor, do you entertain any opinion as to whether or not the history of tick bite has any connection with the virus pneumonia?

A. Well, I thought not.

Mr. Mackey: That is all.



(Testimony of Adelbert M. Moody.)

Mr. Friedman: I have no questions.

Mr. Taaffe: Just a few questions.

Redirect Examination

Mr. Taaffe: Q. Doctor, you were asked a question concerning whether it was your opinion that a person could suffer from Rocky Mountain spotted fever evidencing itself in the form of a rash on the same day when a tick was found on the man's body, and I believe your answer was that you did not think [158] the rash could be attributed to that tick; is that correct? A. That is right.

Q. Would your answer be any different if you did not know the length of time that the tick was on the body? Let me put it this way. I will withdraw the question and make it clear in two or three questions.

A tick does not stay on a man only for a matter of moments or hours, does it?

A. Well, I have had no experience with ticks, to tell you the truth.

Q. Did you ever see a dog infected with ticks—infested with them, I should say?

A. No, I think not. I have not had a dog for a good many years, and I have forgotten.

Q. Have you ever seen sores created by ticks on animals other than dogs? A. Oh, yes.

Mr. Mackey: I object to that question, your Honor, on the ground that there is no showing that the effects of rickettsial diseases on dogs and other animals are the same as those on man.

(Testimony of Adelbert M. Moody.)

The Court: All Mr. Taaffe is trying to bring out——

Mr. Taaffe: The length of time.

The Court: The evidence does not show how long it was on the man's body.

Mr. Mackey: The evidence is on the onset, not the bite.

Mr. Taaffe: Q. In those cases where you have seen tick sores on animals, the thing had been on there for several days, isn't that correct?

The Court: I think you are getting into a field that the doctor is not familiar with.

Mr. Taaffe: He said he saw tick sores on animals.

The Witness: No, I did not say that I had seen tick sores [159] on animals.

Mr. Taaffe: I misunderstood you, Doctor.

The Witness: I have seen sores on animals, but I do not know whether they were due to ticks or not. I have seen scabs.

Mr. Taaffe: Q. You do not know that a tick will not remain on an animal or a human being for a period of days, do you?

A. I do not know anything about the habits of ticks, to tell you the truth.

Q. How soon, Doctor, after a tick bite can Rocky Mountain spotted fever display itself?

A. Well, I understand that the incubation period is anywhere beyond two days, from two days up.

Q. To what limit?

A. Well, to ten or twelve days—two to twelve days, something like that; that is my understanding.

(Testimony of Adelbert M. Moody.)

Q. In Rocky Mountain spotted fever cases how soon does death ensue as a result of infection, as a rule?

A. My understanding is it is a matter of ten or twelve days ordinarily before death ensues or sometimes maybe even a little later than that.

Q. Sometimes it may be from four days on; isn't that the average, around six days instead of twelve?

A. My impression was it was longer than that. As a matter of fact, I tried to find a reference to the exact—the shortest time possible, but that I haven't found.

Q. You could not find that. Doctor, if a tick remained on a person for a few days, two or three days, wouldn't the rash display itself, or couldn't it display itself?

Mr. Mackey: I object to that, your Honor, on the ground that no foundation has been laid for the question.

Mr. Taaffe: We have the right to assume it was on there for a certain length of time. We have the proof that he was [160] hunting for three days in country infested with ticks which carried Rocky Mountain spotted fever, and that on the fourth day, when he was in Reno, he discovered a tick. It could have been on him, at that rate, for four days.

The Court: Of course, there is no testimony as to the habits of a tick. I could draw a little bit on my extrajudicial knowledge. I think if a tick were on a man any length of time, it would bore under the skin.

(Testimony of Adelbert M. Moody.)

Mr. Taffe: I have had millions on me—at least I would say thousands—and I have taken hundreds of thousands off of dogs.

Mr. Mackey: You never had Rocky Mountain spotted fever.

Mr. Taafe: Only the head goes in. A tick has never been known to get all the way under the skin. A chigger will, not a tick. Only the head embeds itself.

Mr. Friedman: Mr. Taafe, isn't your point this: that if the rash is a symptom of Rocky Mountain spotted fever, and if it only appears after a certain length of time, that that appearance must be dependent upon some preceding time when the tick infected the person?

Mr. Taafe: That is it exactly.

Mr. Friedman: What is the use of wasting time?

Mr. Taafe: I do not know that it is conceded—it is so important that counsel for the other company objected to it.

Mr. Friedman: Not at all. Mr. Mackey put his question based upon the testimony of Mr. Nave. Now, as a matter of actual science, there must be an interval of some time between the tick bite and the rash. Just what that is has not been developed.

Mr. Taafe: The objection was there was no foundation laid [161] by showing how long the tick had been on.

The Court: What do you want to show by the doctor?

(Testimony of Adelbert M. Moody.)

Mr. Taaffe: If a tick had bitten Dr. Arthur Barr on the two or three or four days before any rash occurred, and the same tick remained on him, we will say, that a rash could be attributed to the earlier date of the tick bite; isn't that correct?

The Witness: Oh, yes.

Mr. Taaffe: Q. You were assuming, when you were answering the question of Mr. Mackey, that the tick bit the man on the same day that the rash occurred; is that correct? A. Correct.

Mr. Friedman: Of course, you are assuming an infected tick.

Mr. Taaffe: Naturally. You can't get a disease from an uninfected tick.

Q. Doctor, you were asked questions concerning a virus pneumonia related to the influenza virus that killed so many people during the influenza epidemic of 1918 and 1919. You remember those questions, don't you? A. Yes.

Q. The fact is, Doctor, that this was not an influenza virus, isn't that correct?

A. I don't know.

Q. Didn't you in your determinations find it was not, in your opinion, an influenza virus of the type of 1918-1919? A. No, sir.

Q. You did not? A. No, sir.

Q. You could not tell? A. No, sir.

Q. You have testified you cannot identify these bodies that you found in the clusters; is that correct? A. That is correct.



(Testimony of Adelbert M. Moody.)

Q. In what tissues did you find those clustered bodies? A. In the lung only. [162]

Q. Had you ever seen any bodies similar to those before?

A. Yes, I found bodies—well, not identical with, but somewhat similar to, those in another case, in a case of psittacosis that I had examined.

Q. That is so-called parrot fever, is that correct?

A. That is right.

Q. And parrot fever, psittacosis, is also communicated from a tick, isn't it?

A. I thought not.

Q. Isn't it communicable from any parasite that attaches itself to a parrot?

A. I think not, no. It is a respiratory infection. That is my understanding.

Q. By the way, when you were speaking about typhus, the tick is a source of typhus, isn't it?

A. That is correct.

Q. Did this case have any of the elements or appearance of a typhus infection to you, Doctor?

A. I thought not.

Q. One of the reasons that you could not make a determination of these bodies that you saw in clusters as rickettsial bodies was because of the coloring of the stain; that is correct, isn't it?

Mr. Friedman: Just a moment. I am going to object to the form of that question.

The Court: It is leading.

Mr. Friedman: Because it assumes if it was in a different state it would be rickettsial bodies.



(Testimony of Adelbert M. Moody.)

Mr. Taaffe: The question is leading and suggestive. Let me put it this way:

Q. Did the color of the stain of those bodies have anything to do with your determination, Doctor?

A. No, the color did not. It was more the size and shape of them that decided me, because I have been in the habit of making allowances for the [163] method of fixation and the method used in the staining of these. So I realized the color would be definitely off.

Q. You are making allowances for that?

A. Yes.

Q. Am I correct in stating that you testified that the only rickettsial bodies that you have ever seen were those in your typhus studies; is that correct? A. That is correct.

Q. You have never had a typhus case yourself, Doctor?

A. Never. I have had some late cases—I mean a matter of years afterwards—but I have never found rickettsial bodies in those.

Q. And those were typhus cases?

A. Yes, originally.

Q. And you did not find rickettsial bodies in them? A. No, sir.

Q. As a matter of fact, it is the rickettsia which is the infecting agent in typhus cases also; that is correct, isn't it? A. That is correct.

Q. Just the same as it is in Rocky Mountain spotted fever; that is correct, isn't it?

(Testimony of Adelbert M. Moody.)

A. That is correct.

Q. And in those typhus cases you did not find rickettsial bodies?

A. Well, I have examined no acute cases of typhus.

Q. But in those cases of typhus you did examine, you did not find any rickettsial bodies?

Mr. Mackey: Well, did the patients die in the case that you are speaking about?

The Witness: Well, no. I have examined amputated legs and studied the blood vessels of those in the so-called thromboangiitis obliterans, which is supposed to be caused originally by rickettsial organisms, and Rocky Mountain spotted fever does the same thing.

The Court: Q. You mean cases of people who previously had [164] the disease?

A. That is right, some years before.

By Mr. Taaffe:

Q. Have you ever examined an acute case of typhus, Doctor?

A. I never have. I have seen direct smears of typhus organisms.

Q. From those cases of typhus, which were merely a matter of interest and study to you, you formed your ideas concerning rickettsial bodies; is that correct? A. That is correct.

Q. Now, rickettsial bodies are the agents responsible for infection in several different types of diseases besides typhus and Rocky Mountain spotted fever; that is correct, isn't it? A. Yes.

(Testimony of Adelbert M. Moody.)

Q. And rickettsial bodies vary in size and force in various diseases; that is correct, isn't it?

A. That is my understanding.

Q. And you have never to this day had a case of Rocky Mountain spotted fever except the present case, assuming for the purpose of the question only that this is such a case; that is correct, isn't it?

A. That is correct.

Q. You have never before seen what purported to be rickettsia in Rocky Mountain spotted fever cases, did you?      A. No, sir.

Q. When you said that these bodies, which you could not identify, in your opinion were not rickettsial bodies, you were basing that opinion upon your knowledge of rickettsial bodies as they are in the typhus cases; that is correct, isn't it?

Mr. Mackey: If the Court please, I object to that question as impeaching his own witness.

The Court: I will sustain the objection.

Mr. Taaffe: Q. Is your opinion that you have given here that the bodies which you could not identify were not rickettsial bodies based upon your knowledge of rickettsial bodies in typhus cases?

[165]

Mr. Friedman: Same objection.

Mr. Taaffe: This question is not leading.

Mr. Friedman: Well, he is arguing with his own witness.

Mr. Taaffe: If it calls for yes or no, it can't be leading.

Mr. Friedman: He does not claim surprise.

(Testimony of Adelbert M. Moody.)

Mr. Taaffe: I am asking whether his opinion is based upon his experience and knowledge, not for the purpose of impeachment——

The Court: Of course, he has already gone over this ground. The doctor has explained quite fully already the basis of his experience.

Mr. Taaffe: I have not asked him this question. That has not been brought out.

The Court: Are you going to be much longer?

Mr. Taaffe: No, I am not going to be very much longer.

The Court: I suppose you are busy and want to get back. All doctors are. I have run over the adjournment hour now.

Mr. Taaffe: I will be through in two or three minutes at the most.

The Witness: *May* answer would be "Yes" to that question.

Mr. Taaffe: Q. Have you ever before seen what purported to be, in your studies, even rickettsia from Rocky Mountain spotted fever cases?

A. No, I have not.

Q. Doctor, do you know it to be a fact from your reading and studies on the subject that in some cases of Rocky Mountain spotted fever, where the onset is sudden, the course of the disease is short, and death follows——

Mr. Friedman: I object to the question as leading.

The Court: He hadn't finished.

(Testimony of Adelbert M. Moody.)

Mr. Taaffe: It calls for a yes or no answer.

[166]

The Court: The question is not complete.

(Question read.)

Mr. Taaffe: Q. (Continuing) —that no rash of any kind appears? A. I do not.

The Court: I will overrule the objection.

Mr. Taaffe: I think that is all.

Mr. Mackey: I would like to ask one question, because I think counsel has brought in a new matter.

Q. Doctor, did the examination show any of the pathology of typhus fever?

A. Well, it didn't show anything which I considered characteristic of typhus.

Mr. Mackey: Thank you.

Mr. Friedman: Let me ask you one question, if I may:

Q. Doctor, you say you have never actually seen rickettsia produced by Rocky Mountain spotted fever or associated with it in the course of your reading; have you seen reproductions of slides depicting the rickettsia from Rocky Mountain spotted fever? A. Yes, I have.

Mr. Friedman: That is all.

Mr. Taaffe: Q. Pictures of them, you mean, Doctor? A. That is right.

Mr. Taaffe: That is all.

The Court: You may be excused. This case will be continued until two o'clock.

(Thereupon a recess was taken until two p. m. this date.) [167]

Wednesday, November 3, 1943,  
2:00 P. M.

WILLIAM B. HERMS

called for the plaintiffs; sworn.

The Clerk: Please state your full name to the Court.

A. William B. Herms.

Direct Examination

Mr. Taaffe: Q. What is your occupation, Professor?

A. I am Professor of Phorology at the University of California.

Q. Did you receive a tick from Dr. Karl Meyer of the Hooper Foundation in June of 1942?

A. It would be very difficult for me to say positively, because I receive specimens from the Hooper Foundation and from the California State Department of Public Health and from many other individuals, and it would be difficult for me to say positively that I received this specimen. I frequently receive specimens from Dr. Meyer.

Q. Do you frequently receive ticks from him?

A. I have received some ticks from him at various times.

Q. When you speak about "positively," do you mean your memory is dim on the subject?

A. It is.

Q. Have you a recollection of having received a tick at or about that time from him?

A. No, I have not.



(Testimony of William B. Herms.)

Q. You do not have a recollection?

A. No, I do not.

Q. Do you keep records of the receipt of specimens?

A. There would be no record kept unless I replied by letter.

Q. Have you searched your files for any letter concerning that?      A. I did yesterday.

Q. Did you find the letter?      A. No, sir.

Q. Would this refresh your recollection that you wrote a letter to Dr. Karl Meyer somewhere within a few days before June 15, [168] 1942 telling him that you identified a tick?

A. I couldn't find any letters in my file.

Mr. Mackey: I object to that, your Honor. There is no foundation for that question.

Mr. Taaffe: In what particular? That objection is not a good objection, your Honor, unless it is specified wherein the foundation is not laid.

The Court: The witness says he does not recall writing any letter and he hasn't any record of any letter.

The Witness: I found nothing in my file, and I searched through my "M" file yesterday.

The Court: What are you trying to get at?

Mr. Taaffe: I want to refresh his recollection.

The Court: On what particular matter? Have you got some letter?

Mr. Taaffe: No I have here a copy of a letter that was sent by Dr. Meyer to Dr. Moody advising him of the contents——

(Testimony of William B. Herms.)

The Court: You want to show that document to this witness and refresh his recollection?

Mr. Taaffe: No; this is not his letter, your Honor. This is Dr. Meyer's letter reporting what was found.

The Court: If it serves to refresh his recollection, I do not see any objection to that.

Mr. Mackey: Might I ask a question in aid of the objection?

The Court: Yes.

Mr. Mackey: Q. Do you recall ever having seen such a letter as counsel has just described, being a letter from Dr. Meyer addressed to Dr. Moody?

A. No, sir.

Mr. Mackey: I object, your Honor. I do not see how it could tend to refresh his recollection.

[169]

The Court: There may be something in the letter that would recall the incident to the witness, and even if it is not his own letter, if it would serve to refresh his recollection it would be proper. I do not see any harm in that.

Mr. Mackey: The letter itself——

The Court: Have you seen the letter?

Mr. Mackey: No, I have not.

The Court: Suppose you show it to Mr. Mackey.

Mr. Mackey: Furthermore, the letter has been in no way authenticated, and while I do not distrust Mr. Taaffe, we have a right to insist on that.

Mr. Taaffe: Dr. Meyer gave me that yesterday.

The Court: I recall Mr. Taaffe asked Dr. Meyer

(Testimony of William B. Herms.)

when he was on the stand whether or not he had written a letter, and the witness produced this.

Mr. Taaffe: That is right.

Mr. Mackey: And we objected to its introduction, and it wasn't offered.

Mr. Taaffe: I did not attempt to introduce it. They anticipated I would, and made an objection.

May I state this to your Honor: We have attempted to get Professor Herms' original letter, and in tracing it we find that letter was sent by Dr. Meyer to Dr. Berger. Dr. Berger enlisted afterward in the Navy and he was sent to the South Seas. He is there now. I sent a cable, which can be verified through Western Union—I first contacted the person who was in possession of Dr. Berger's files to get it. That person told me the files were so numerous that unless I knew the specific file or the specific place it might be he couldn't get it, and I then sent a cable to the South Pacific asking Dr. Berger to [170] advise me immediately collect where that file was. I have received no reply. As a matter of fact, they did not want to take the cable unless there was a good reason. I told them of this suit, and they sent the cable; we have got no reply. I am now simply trying to refresh the witness' recollection. This is Dr. Meyer's own writing on this. He wrote it in my presence and he gave it to me yesterday, and I might call your Honor's attention to the date, April 10, which is a mistake. June 10 is what it should read on there. That is obviously a typographical error.

(Testimony of William B. Herms.)

Mr. Mackey: I do not think the typographical error is so obvious, your Honor.

The Court: I will allow him to show the letter to the witness, and if he can say it refreshes his recollection as to the particular matter that you are referring to, all right. It may be that it will and it may be that it won't.

Mr. Taaffe: Maybe it won't.

The Court: I do not know of any rule of law that restricts you to documents that the witness himself has signed or issued for the refreshment of recollection. He may have his recollection refreshed by a newspaper article or anything. I think that is the correct rule on that.

Mr. Taaffe: Q. I show you that letter and ask you if that refreshes your memory.

A. May I see it, please? This letter points out, "Professor W. B. Herms advises me that the particular tick you brought to my office was a *Derma-centor andersoni*." I probably wrote no letter. It was probably handed to me, I probably examined it and telephoned to Dr. Meyer.

The Court: Q. And does this document refresh your recollection?

A. Not on that particular instance. I am sorry.

[171]

Mr. Taaffe: That is all, Professor.

Mr. Mackey: No cross-examination.

HOMER E. MARSTON

called for the plaintiffs; sworn.

The Clerk: Please state your full name to the Court.

A. Homer E. Marston.

Direct Examination

Mr. Taafe: Q. Will you state your profession, Doctor? A. Physician and surgeon.

Q. Licensed to practice your profession in the State of California?

A. In the State of California.

Q. Since what date, Doctor?

A. Since 1924.

Q. Doctor, you are a graduate of what school of medicine? A. Stanford Medical School.

Q. Since your admission to practice medicine, Doctor, where have you been engaged in the practice? A. In San Rafael.

Q. Marin County, California?

A. Marin County.

Q. Have you been engaged in the general practice of medicine in that community since 1924?

A. Yes, I have.

Q. Did you know Dr. Arthur Barr in his lifetime? A. Yes, I have.

Q. How long have you known him, Doctor?

A. Oh, probably twenty or twenty-five years.

Q. Had you had an opportunity to observe him generally prior to the onset of his fatal illness?

A. Generally, yes; never professionally.



(Testimony of Homer E. Marston.)

Q. You had never been his doctor on any occasion?

A. His family's, but I never attended him.

Q. He had never called on you in all the years you knew him [172] for any medical services to himself?

A. No, he hadn't.

Q. Although he had called on you for medical services to members of his family?

A. Yes, sir.

Q. You knew the members of his family, I take it?

A. Yes.

Q. You knew his widow, Mrs. Zeila Barr?

A. Yes.

Q. You knew his two children, Billy Barr, that is, the plaintiff in one of these actions—

A. Yes.

Q. You knew his daughter, Agnes Barr, is that so?

A. Yes.

Q. You knew other members of his family; you knew his mother?

A. Yes.

Q. You knew his brothers?

A. Yes.

Q. You were quite well acquainted with the family, is that true?

A. Yes, I have been.

Q. Was Dr. Barr a man of healthy activities, as far as you were able to observe him for twenty or twenty-five years?

A. Very much so.

Q. Did you know of his inclination for hunting and fishing?

A. Yes, I did.

Q. As a matter of fact, in that community he was well known; is that true?

A. Very well.



(Testimony of Homer E. Marston.)

Q. Had you ever known him to be sick or unhealthy prior to the onset of the fatal disease?

A. No, I never did.

Q. Doctor, when were you first called into this case?      A. On June 4, 1942.

Q. And by whom?

A. By Mrs. Barr, his widow.

Q. Did you call at his home and find him there at that time?      A. Yes, sir.

Q. Was he in bed?      A. Yes.

Q. Did you make some investigation or observations at that time?      A. Yes, I did. [173]

Q. What did you do and what did you find?

A. Well, I took a short history. He had stated that the night previous he had felt some chills and had fever. He suffered from headache—he had suffered from a headache all day, and had had some abdominal discomfort. He came home early from his office, took a cathartic, and went to bed early.

Mr. Mackey: Q. May I interrupt, Doctor, to ask you, Are you refreshing yourself with notations that you made at the time?

A. Yes, I am. I have my notes here.

Mr. Taaffe: Q. Go on, Doctor. What was done in addition to that?

A. And then he stated that “this morning”, that is, the morning that I was calling on him, the 4th, that the headache had become much more severe as well as the chills and fever, and that he ached all over his body, that is, the aches were more severe,

(Testimony of Homer E. Marston.)

and he also stated that his mind was somewhat confused, and that he had been very restless and that he had passed a very uneasy night, sleeping at very, very short intervals, and he also complained that his mouth was quite dry.

He also stated that he had gone hunting in Lassen County for antelope on the 27th of May and stayed up there until the 31st of May, and on the 31st, as they were coming out, he noticed a tick on his abdomen, and this had been removed by one of his companions, Louis Nave.

Q. Louis Nave?

A. That is the name he gave, Nave.

Q. You put the name down as Nave?

A. Nave, yes. And, incidentally, he also told me that in the history that he had seen Dr. Leroy Briggs of San Francisco on the 2nd of June 1942 for a physical check-up, and that Dr. Briggs had told him that he was all right. And then in my examination I found him to be exceedingly restless, apparently in pain. There was some [174] slight cyanosis, that is, blueness of the skin. He was somewhat confused. He had herpes of the lips.

Q. Do you mean confused mentally, Doctor?

A. Yes, somewhat. He seemed to shake himself out of it, but there was some mental confusion there.

Q. What are herpes of the lips?

A. They are little blisters, or fever blisters. His tongue was dry and coated. His abdomen was tympanitic, that is, swollen with some gas, slightly

(Testimony of Homer E. Marston.)

tender in the upper part. His temperature was 102, pulse 120, and respirations 20.

Mr. Mackey: Q. May I ask, Doctor, when this was?

A. This was the morning of the 4th of June about eleven o'clock.

Q. After admission to the hospital?

A. No.

Mr. Taaffe: No.

Mr. Mackey: This was the day before.

Mr. Taaffe: This was on the same day, but in the morning.

The Witness: Those were the positive findings. I ordered a blood count made. Would you like me to read the results of that?

Mr. Taaffe: Q. Yes, if you would, please, Doctor.

A. The white cells were 2,800; polymorphonuclears 84 per cent; eosinophiles .5 of 1 per cent; lymphocytes 15.5 per cent.

Q. You are going a little fast for us, Doctor. Polymorphonuclears were 84 per cent?

A. 84 per cent.

Q. What was next?

A. Eosinophiles were .5 of 1 per cent, lymphocytes 15.5 per cent, stabs 31 per cent.

Q. Is that an abbreviation?

A. Yes, stab nuclei. They are polymorphonuclears.

Q. Stab nuclei? A. Yes.

Q. What percentage were they?

(Testimony of Homer E. Marston.)

A. 31. Hemoglobin was 76 [175] per cent, and red blood cells 4,800,000.

Mr. Friedman: Q. What were the red blood cells?

A. 4,800,000. A sedative was prescribed for him, and then I called in to see him again about five-thirty in the afternoon of the same day, and he was markedly confused at that time and very, very restless, dehydrated——

Mr. Taaffe: Q. Will you go a little bit slow, Doctor, until we get these symptoms? At five-thirty you say he was markedly confused, is that correct?

A. Yes, very restless, dehydrated, and in extreme pain throughout his body. It was at that time that I took him to the Cottage Hospital and put special nurses on with him and gave him fluids intravenously and morphine for his pain.

On the next day, the 5th of June, I saw him at least five times, and the first time was around eight o'clock in the morning, and he was quite confused, restless, uncooperative, and seemed in great pain. More fluids were given to him intravenously and at nine o'clock Dr. A. C. Reed of San Francisco, whom I had called in consultation, arrived and we went over him together. The only positive findings with Dr. Reed were a few crepitant rales in both chests, both lungs.

Q. What are rales?

A. Well, they are sounds that you hear in the chest due to—they are a little crackling sound, as

(Testimony of Homer E. Marston.)

a rule, that you usually either find in a bronchial infection or a lung infection.

That morning his temperature was 104, pulse 130, and respirations 30.

Q. Temperature 104; pulse was what?

A. 130, and respirations 30. The urine at that time showed a medium heavy cloud of albumen; sugar one plus, casts and some blood. He was [176] unable to urinate, so we had to catheterize him, and we got it with some difficulty. This was while Dr. Reed was there.

At the same time we also—Dr. Reed and I—did a spinal puncture and sent the fluid to a laboratory in San Rafael for examination, and it was found to be negative.

A number of other blood examinations were made. His blood was tested for malaria parasites and relapsing fever. They were negative. Stool and urine examinations, that is, cultures, were made. They were negative. And then blood—oh, yes, also X-rays were taken of his chest, and the films were read by Dr. C. A. Fogarty of San Francisco. His report revealed numerous areas of consolidation through the right lung and along the main stem bronchus in the left lung. Heart showed well marked lack of muscle tone. His conclusions were a widespread pneumonia of the influenzal type.

As I said, I saw him about five times that day. He just progressively got worse, so that towards evening—well, it was around about eight o'clock in the evening of the 5th, he became unconscious. He



(Testimony of Homer E. Marston.)

had been very nervous, restless, hard to keep in bed, and did not seem to respond to any of the therapies that we were giving, that is, fluids. I also gave him some blood, 500 cc.

Q. Blood transfusion?

A. Blood transfusion, and we had to give him morphine for pain. As I say, he became unconscious by eight o'clock, and very cyanotic or blue. His respirations were quite labored so that we put him into an oxygen tent. But none of these methods or means of therapy did any good whatever and he expired the next morning, on the 6th of June, at 4:25 a. m. The diagnosis was acute bronchial pneumonia, cause unknown. [177]

Q. Doctor, did you report—

A. Could I interrupt? On the 12th of June a blood specimen was sent to the Bureau of Laboratories at Berkeley and an examination made by a Dr. Eaton, and they made blood tests or tests on this blood serum and agglutination tests for plague, tularemia and six strains of proteus, which were reported on the 15th to me as all negative.

Q. Doctor, did you report this to the State Board of Health?

A. I did report it. I do not remember whether I reported it by phone, however, or by mail.

Q. Was that before Dr. Barr's death?

A. Yes.

Q. What did you report to them concerning the nature of the case?

A. I had said that there had been a tick bite,



(Testimony of Homer E. Marston.)

and, of course, I was not sure of my diagnosis. I did not know the exact cause of death outside of the bronchial pneumonia.

Q. Doctor, were you present at the autopsy?

A. Yes, I was.

Q. It took place in the Keaton undertaking parlor in San Rafael? A. Yes.

Q. On June 9, 1942; there is no dispute about the day. A. Yes.

Q. There were several other doctors present; that is correct? A. Yes.

Q. Did you make a gross examination or gross observations at least while the autopsy was being performed? A. Yes.

Q. What condition did you observe of the lungs, Doctor?

A. It showed patches of consolidation in both lungs.

Mr. Mackey: Q. May I interrupt to ask, Mr. Taaffe, Do you have notes concerning the observations that you made at the post mortem examination? A. No, I do not.

Q. But up until that point was reached in your testimony you have refreshed your recollection by your clinical notes? A. Yes, I have. [178]

Mr. Mackey: Thank you, sir.

The Witness: I have a note here that I attended the post mortem examination, that there were patches found in the lungs.

Mr. Taaffe: Q. Doctor, do you have any opinion—answer this yes or no—as to what relationship the tick bite bears to this case? A. Yes.

(Testimony of Homer E. Marston.)

Q. And to the cause of death, that is, the terminal cause, bronchial pneumonia? A. Yes.

Q. Will you state what that opinion is, Doctor?

Mr. Mackey: If the Court please, I think he has hardly been qualified yet.

The Court: He was the attending doctor. What is the point of your objection?

Mr. Mackey: I think there is no foundation laid for him to give expert testimony.

The Court: Well, if he is a qualified doctor—maybe there isn't any basis for his opinion. I do not know what you are getting at.

Mr. Mackey: So far he has merely testified as to the diagnosis that he made. I do not know whether he knows anything about rickettsial diseases.

Mr. Taaffe: We will submit the objection.

The Court: I will overrule the objection.

Mr. Friedman: May we have the same objection subject to the same ruling?

The Court: Yes.

Mr. Taaffe: Q. Will you state, Doctor, what that opinion is?

A. I have felt that due to the history of the tick bite in an area where there have been cases reported of tick bite fever, and due to the abruptness of the onset, the mental [179] confusion, nervousness, extreme pains, incubation period of approximately three or four days—I felt that it was most likely due to tick bite.

(Testimony of Homer E. Marston.)

Q. At the autopsy, Doctor, did you notice any spots on any part of the body of Dr. Barr?

A. I did see a few pink spots—this is from recollection—on the left arm or shoulder. I don't remember how many, but the pathologist called attention to these few pink spots in that region.

Q. Were those what are known medically as petechial spots?      A. They appeared that.

Q. They appeared to be petechial spots. Doctor, you spoke about your first and original observations on the morning of June 4 as including the following conditions: chills, fever, headache, abdominal discomfort, in addition to which you at that time received a history of a tick bite. Are those symptoms which you have related and which I repeated indicative of Rocky Mountain spotted fever?

A. Well, they do have those symptoms in Rocky Mountain spotted fever.

Q. Are those the symptoms that you would expect to meet or to see from a patient who related that he had been bitten by a tick and which you suspected to carry Rocky Mountain spotted fever?

A. Those would be the symptoms that you would expect to find.

Q. You have testified, Doctor, that later on that day, or, rather, I believe you said on the same morning—at least it was on the same day—that you found he was suffering from aches and pains all over the body, that he was cyanotic, that he was confused mentally, had herpes of the lips; his tongue was dry and coated, his abdomen was swollen, his tempera-

(Testimony of Homer E. Marston.)

ture 102, pulse 120, and his respiration 20—were all of those symptoms which are [180] usually found in Rocky Mountain spotted fever cases?

A. Yes.

Q. Are those the things that you would expect to find in a Rocky Mountain spotted fever case?

A. Yes.

Q. At that stage of the case? A. Yes.

Q. Doctor, you sent these blood specimens, together with the fluid taken in the spinal puncture, to various laboratories for examination, is that correct? A. Yes.

Q. They were negative, is that correct?

A. Yes.

Q. Is there any significance, in your opinion, attached to the fact that those examinations were negative? A. Do you mean all of the tests?

Q. Yes; any conclusive——

A. There was nothing conclusive about it.

Q. Is it a common occurrence or experience, Doctor, in taking blood tests, not only in Rocky Mountain spotted fever, but in many other fevers, that such tests result negatively?

A. Many times.

Q. Is it an accepted proposition of the medical profession that blood tests are not regularly relied upon? A. Not entirely so.

Q. They are not entirely relied upon in Rocky Mountain spotted fever, is that correct?

A. In early stages it is not entirely relied on, no.

Q. Doctor, you said that on the afternoon of

(Testimony of Homer E. Marston.)

June 4th he was markedly confused. Could you elaborate on that description to tell us just how far he was impaired mentally at that time?

A. Well, he was very uncooperative, and when you asked him to do things, he didn't seem to understand what you were trying to get at. He wouldn't take nourishment. He was trying to get out of bed. In fact, we had to have two nurses in there at one time to [181] watch him, because he just did not seem to know what he was doing.

Q. Is that delirium, so to speak?

A. Delirium.

Q. He was in a delirium, is that correct?

A. Yes.

Q. When did he enter the delirious stage, Doctor?

A. He was delirious when we brought him to the hospital.

Q. In other words, when you saw him at—what time was it?

A. 4:30 in the afternoon he was definitely delirious.

Q. At what time had you seen him that morning?

A. Around eleven o'clock.

Q. He was able enough to give you some history of himself at that time, that is, of his condition?

A. Yes.

Q. That afternoon at 4:30 he was in a delirium, is that correct?

A. He was in a delirium, yes.

Q. Did he ever come out of that delirium, from that time until his death on the following Saturday morning?

A. No, he did not.



(Testimony of Homer E. Marston.)

Q. In the hospital was he likewise uncooperative? A. Very.

Q. In addition to the other things was he shouting and yelling? A. Yes, he was.

Q. Quite loudly? A. Very loudly.

Q. You say on that afternoon about 5:30 you found him markedly confused, restless, dehydrated, extreme pain over the body—those are the symptoms you would expect to find in a Rocky Mountain spotted fever case at that stage of it?

A. Yes, you would.

Q. Were all of the symptoms as you have related them, his actions, indicative of Rocky Mountain spotted fever? A. Yes.

Q. Throughout the time that you had him under observation? A. Yes.

Q. You had not noticed petechial spots during his lifetime, that [182] you saw on his arm at the time of his death? A. No, I had not.

Q. Had you looked for a rash, or petechial spots, during his lifetime? A. Yes.

Q. But you did not notice any?

A. I didn't notice any.

Q. Did you notice at any time any rash or petechial spots except after death?

A. The morning Doctor Reed was there there was just a faint flushing of the skin, a redness in the upper part of his back. That was the only change that we saw.

Q. Doctor, is it or is it not a medical fact that where the onset of a disease is Rocky Mountain



(Testimony of Homer E. Marston.)

spotted fever, so sudden, or as sudden in this case, the prosecution is so fast or swift and death ensues within such a short time that rashes do not always occur?      A. That is right.

Q. That is correct, isn't it?

A. That is correct. There have been cases reported where no rash has ever been found.

Q. And where it was definitely Rocky Mountain spotted fever?      A. Yes.

Mr. Taaffe: I think that is all.

### Cross Examination

Mr. Mackey: Q. I wonder if you could tell us, Doctor, by whom those cases were reported where death occurred without a rash?

A. I couldn't tell you whom they were reported by, but I have read such.

Q. You have read that statement made by textbook authors?      A. It is possible.

Q. Have you read that in the report of the autopsy of any specific case?

A. I couldn't say if I have.

Q. I might ask you, Doctor, have you ever read Bulletin 177 that is published by the Federal Department of Health in Washington, which reviews the autopsy since 1932?

A. No, I have not. [183]

Q. Are you familiar with any other publication which reports the findings on post-mortem examination of Rocky Mountain spotted fever cases?

A. No, I have never seen any that just dealt with post-mortems.

(Testimony of Homer E. Marston.)

Q. Pardon me?

A. I have never read any that just dealt with post-mortems.

Q. Have you ever read any publication which dealt with a specific named case?

A. No; I have read that there have been cases that absolutely showed no eruption, that there had been cases reported.

Q. Now, I understand that in the first part of your testimony, which was prior to the time you mentioned the autopsy, that you were refreshing your recollection from notes that you had made at or shortly after the time of Doctor Barr's illness.

A. Yes, sir.

Q. I would just like to see those notes, and would you hand me the particular piece of paper that refers to your testimony to the effect that Doctor Barr told you that he had been bitten by a tick?

A. Well, I will show you what I have here.

Q. I just, for example, refer to that portion of the notes.

A. "When hunting in Lassen County for antelope"—

Q. Will you speak up so we can all hear you?

A. "When hunting in Lassen County for antelope on May 27, 1942, to May 31, 1942, found tick on body, on May 31, 1942, and removed it," and I have in parenthesis "by Louis Nave."

Q. He told you that the tick was removed by Louis Nave, did he, as you refreshed your recollection by your own notes?

A. Yes.

(Testimony of Homer E. Marston.)

Q. Now, I would take it, Doctor, that you base your opinion that it was likely that this pneumonia was produced by a tick bite on [184] the supposition that Doctor Barr was bitten by an infected tick, is that correct?

A. Yes, I would base my supposition on that.

Q. And if you removed that supposition from your hypothesis, what would then be your opinion as to the cause of his pneumonia?

A. Possibly an influenzal type of thing.

Q. And the clinical course was entirely compatible with what you term an influenzal type of thing, was it?

A. It could be, yes.

Q. The cyanotic condition is one that is usually encountered in a pneumonia case shortly prior to death?

A. Yes.

Q. Pains, chill and fever, are the usual characteristics of any serious febrile disease, are they not Doctor?

A. Yes.

Q. In fact, any of the manifestations which you noted of Doctor Barr at any time, from his first visit on the morning of the 11th until his death, were the same manifestations which you would expect in any febrile disease of that short a duration, were they not?

A. No, I do not think you always find the mental confusion, the extreme restlessness, and the extreme pain that one does find in Rocky Mountain spotted fever.

Q. Let me ask you, did you ever observe a case of Rocky Mountain spotted fever yourself, before?

(Testimony of Homer E. Marston.)

A. I never have, no.

Q. What do you base your opinion upon to the effect that the sensations of pain and these other manifestations which you have mentioned are more severe in Rocky Mountain spotted fever than other diseases? A. Just on what I have read.

Q. Can you tell us what you have read in that respect?

A. That the pains are most extreme——

Q. Yes?

A. (Continuing): ——throughout the body——

Q. Can you give us the name of the author who made that statement? [185]

Mr. Taaffe: Just a moment. Will you let the witness finish his statement?

The Court: I think probably the doctor did not understand his question. He did not ask him to repeat anything; he asked him for the source of his information.

A. No, I couldn't give you any source. I have read a number of articles on it.

Mr. Mackey: Q. Can you give us the names of any of them? A. No.

Q. When did you read them?

A. Oh, the last year, off and on.

Q. Since the date of Doctor Barr's death?

A. Yes; I have been interested in anything that had to do with Rocky Mountain spotted fever, and anything that came to my attention, I read it.

Q. Have you had under your supervision any

(Testimony of Homer E. Marston.)

fatal virus, atypical or influenzal pneumonias that were fatal?      A. No, I have not.

Q. Well, have you observed the complaints of one who is suffering from those diseases which had a fatality as a result?

A. No, I have not. I haven't seen one.

Q. How do you know that people who have a virus pneumonia and who succumb as soon after onset as did Doctor Barr after his do not experience pains as intense as those which are experienced in spotted fever? How do you know that to be the fact?      A. Only by what I have read.

Q. And you can't tell us the name of any author who has made a statement to that effect?

A. No, I can't.

Q. If we took a little recess would you be able to do it? Have you got your material with you?

A. No, I haven't a thing with me.

Q. Where have you your material that discloses that medical [186] information?

A. I have pamphlets in my office. I have had access to textbooks. I have seen one or two journals on the subject.

Q. What is the nature, Doctor, of the statement that is made in those pamphlets or journals, or some of them? Is it specifically to the effect that the pains in spotted fever cases are more severe than those in atypical pneumonia cases?

A. No.

Q. What do you recall were the statements that you have read?



(Testimony of Homer E. Marston.)

A. Well, that the pains are most severe; that they do not respond well to narcotics,—morphine and things of that sort; that even with large doses one is unable to relieve them and give them rest, which would seem to me that certainly the pains were most severe. I have seen a number of pneumonia cases. I have not seen any that have been fatal, but usually you can make them pretty easy with that method of treatment.

Q. That is, in the mild cases, or non-fatal cases, which you have observed, it has been easy?

A. Yes.

Q. Do you know whether it is easy to relieve the patient of pain when he has otherwise than a mild attack of pneumonia? A. No.

Q. You do not know that from your own experience? A. I have not seen one.

Q. So your statement to the effect that the pain experienced by the spotted fever patient is more severe than that experienced by the patient who dies of atypical pneumonia is not based upon any experience of your own? A. That is right.

Q. And it is not based upon any statement which you have read, in medical authorities, to the effect that the pain of spotted fever is any more severe than the pain in virus pneumonia?

A. No, I do not think I have ever seen that.

[187]

Q. Now, as I understand your testimony, Doctor, you have read a statement to the effect that the



(Testimony of Homer E. Marston.)

pain is most severe, and it is from the use of those words, "most severe," that the author meant it is more severe than in any other kind of a case?

A. No, I do not believe so; I think there are other cases, other diseases, that have pains just as severe.

Q. And among those would you enumerate, possibly, a fatal pneumonia?

A. It is possible.

Q. Aches, chills, fevers,—those are common in all febrile diseases? A. Yes.

Q. But you feel they are more severe in cases of spotted fever than in others? A. Yes.

Q. But you can't call our attention to the specific source on which you base that belief?

A. No.

Q. Now, when you were attending this case you called in Doctor Reed as your associate?

A. Yes.

Q. You had observed the man's body pretty closely before his death, had you not? A. Yes.

Q. You made a conscientious and thorough examination of his skin? A. Yes.

Q. And there were no blotches or petechia anywhere on his body while he was in the hospital?

A. No, there were none.

Q. Doctor Moody testified this morning that a petechial rash resembles a bruise.

Mr. Taaffe: Just a moment.

That was not his testimony.

Mr. Mackey: I will submit to the record on that.

(Testimony of Homer E. Marston.)

Mr Taafe: I will submit to the record on that, too. Doctor Moody explained afterwards that petechia were spots only; that he was speaking of the hemorrhagic areas. That is exactly [188] what he said when he was describing it.

Mr. Mackey: Exactly, Mr. Taafe.

Mr. Taafe: Not petechia.

Mr. Mackey: I beg to differ with you in this respect; that he explained petechia as that particular phase of a rash which results from the seeping of the blood into the surface of the body when the occlusion and thromboses of the vessel has occurred.

Mr. Taafe: The infiltration of the blood, he said, into a small spot. He described it afterward when I asked him the question. He said, "I meant by bruises those large hemorrhagic areas."

Mr. Mackey: Rather than arguing the point at length——

Q. Let me ask you this: Does a petechial rash resemble a bruise?

A. It does when the petechiae join together sometimes. My understanding of it, it would resemble a bruise.

Q. In other words, if the rash were no longer discreet and had run together——

A. Confluent.

Q. (Continuing): ——it resembles a bruise?

A. Yes.

Q. You spoke of seeing a rash on the left shoulder.

A. The left shoulder, as I recall.

(Testimony of Homer E. Marston.)

Q. At the autopsy? A. Yes.

Q. And that rash was not on the decedent at any time prior to his expiration?

A. I didn't see it if it were.

Q. But you made a careful examination of his body? A. Yes.

Q. And of that portion of his body. Now, in your studies on Rocky Mountain spotted fever have you come to any conclusion as to where a rash in that disease first appears?

A. Well, it first appears on the wrist and ankles.

[189]

Q. And then does it spread?

A. And then it spreads up the arm, the legs, and onto the rest of the body.

Q. And while this man was in the hospital he had no rash on his ankles or arms?

A. No, he did not.

Q. Can you describe for the Court the nature of this rash which you first saw in the deltoid area at the post-mortem?

A. They were little pink spots.

Q. Little pink spots. And were they run together? A. No.

Q. They were distant?

A. They were distant.

Q. Did you examine them closely?

A. Yes, I looked at them fairly closely.

Q. In your opinion, did they result from the handling of the body?

(Testimony of Homer E. Marston.)

A. It is possible. I was quite surprised when I saw them.

Q. And during some portion of the embalming process?

A. It is possible, because I had not seen them before in the hospital.

Q. In your opinion, may a sound diagnosis of spotted fever be based solely on clinical manifestations?

A. Sometimes one has to make diagnoses of symptoms.

Q. In this particular case I suppose you were familiar with the findings that the pathologist made, are you?

A. No, I have never seen a report.

Q. Well, Doctor Moody testified this morning that none of the peripheral blood vessel pathology characteristic of Rocky Mountain spotted fever was present, and he also testified that he could not demonstrate rickettsia in any of the post-mortem specimens. Does that present, in your opinion, Doctor, one of these instances where you must diagnose a disease solely on the basis of clinical manifestations, or do we have in this case [190] other factors—and by them I refer to the findings by the pathologist—do we have other factors on which any sound diagnosis should be based, as well as upon clinical signs?

A. No. I based my own mostly on the history and the course of his disease, although there was

(Testimony of Homer E. Marston.)

no rash. There were no serological tests that were constant. My opinion was based on the history.

Q. The serological tests in no way created any inference that he did have spotted fever, did they?

A. No, they did not.

Q. And you exclude from the hypothesis upon which you reach your diagnosis any of the things that were revealed by microscopic examination of the tissues of the decedent, do you not?

A. I do not know what they were, except as you have told me now.

Q. Supposing you take my word for it, that the microscopic examination of the peripheral blood vessels failed to show any proliferations, occlusions, or thromboses, in the arterial blood vessels of the body.

A. It might not show any, if there had been no eruption, because those are the areas where you are most likely to find that condition.

Q. Is the rash, in your opinion, the result of the proliferations in the blood vessel?

A. No; it is due to hemorrhage into the tissue.

Q. What are the respective stages of the pathology in the blood vessel in cases of spotted fever? Do the hemorrhages come first?

A. No.

Q. The proliferations come first, do they not?

A. The proliferations—I am not too clear on that; I am not expert on pathology.

Q. That is correct, according to Doctor Moody's testimony; the [191] proliferations come first, and



(Testimony of Homer E. Marston.)

then, as that process, which is, as I believe, the multiplication of cells, is it not, Doctor?—

A. Yes.

Q. (Continuing): —as that process proceeds, it breaks down and clogs up the blood vessel; that would be the occlusion?

A. Thrombosis, yes.

Q. And that would be followed eventually by the thrombosis, is that correct? A. Yes.

Q. And it would be at the time of the thrombosis that you would have, I think they call it, an extravasation of the blood into the tissues?

A. Yes.

Q. That would be the time that the rash would appear, is that correct?

A. The petechiae, yes. I do not think petechiae are the same as the pink spots that you get early.

Q. Yes, I think that might be right; but in any event you may have the characteristic blood pathology of spotted fever, you could have the initial stages of that pathology, that is, the proliferation without the petechiae, which you say is the result of the subsequent process in the blood vessel, namely, the thrombosis, is that correct?

A. Yes.

Q. Let us assume, Doctor, that the testimony shows that there were no proliferations of the endothelium in the body of Doctor Barr; taking that fact into consideration, would you alter your diagnosis, which has heretofore been based solely on



(Testimony of Homer E. Marston.)

clinical signs? Is that additional fact, hypothetically, of course, entitled to any weight?

A. I think it does bear some weight.

Q. Would it bear enough weight to in any way cause you to alter your opinion?

A. Yes, it certainly would have an effect.

Q. And if it were a fact that a proper examination of Doctor Barr's peripheral blood vessels revealed that he had none of the [192] original pathology, namely, the proliferations, would you still be willing, simply on the basis of the clinical facts that you saw, and upon the possibility that he may have been bitten by a tick that was infected, would you still, as a professional man, tell this Court that it was your opinion that a tick bite was more likely the cause of this man's death?

A. I think——

Q. Will you answer that yes or no, first?

A. It is known that there always is proliferation in the terminal vessels in tick bite fever?

Q. I beg your pardon, sir, but I am not being examined.

Mr. Taaffe: Will you let the witness answer the question? He was right in the middle of a sentence when he was interrupted by the remark of counsel.

Q. Will you please answer the question, Doctor?

A. Well, if it is a proven fact that you always find this proliferation in Rocky Mountain spotted fever, that is, in the terminal blood vessels, and if there were none there, why, of course, it would alter my opinion.

(Testimony of Homer E. Marston.)

Mr. Mackey: Q. What is your opinion as to whether or not those proliferations are always present? A. I do not know.

Q. You already testified that death may occur before the occurrence of a rash? A. Yes.

Q. You have read that statement?

A. Yes.

Q. You could not support it by the authorities from which you read it? A. That is right.

Q. But you also conceded that death might occur before the appearance of a rash, but after the proliferations, which are not the cause of the petechial rash; you so testified, did you not?

A. Will you state that again, please? [193]

Q. Well, you testified that the petechial rash is the result of the thromboses of the blood vessels.

A. Yes.

Q. That is correct, is it not? A. Yes.

Q. And the thromboses, we all know, is two or three stages in the pathology removed from the original proliferations, is it not? A. Yes.

Q. Therefore, it would be sound to say that you could have proliferations without petechial rash?

A. Yes.

Q. Now, you say you do not know whether or not you can have death without proliferations?

A. Yes.

Q. That is a subject upon which you are entirely in the dark? A. Yes.

Q. And your reading has not tended to assist you in coming to any conclusion on that point?

(Testimony of Homer E. Marston.)

A. That is right.

Q. Now, are you then able, with any degree of conviction whatever, to make a diagnosis, or to express an opinion in a case like this, where it is known that there were no proliferations or other lesions of the peripheral vessels—are you still willing to say that you will diagnose this case as a spotted fever case solely on the clinical manifestations?

A. I think I could have that opinion without——

Q. Can you refer us to any text in which the author regards the clinical manifestations as a sound base upon which to diagnose spotted fever?

A. No; they always wanted to get all of the manifestations, if possible, but——

Q. Isn't it a fact, Doctor, that the bulk of the authority, if not, in fact, the uncontradicted authority, is to the effect that the only helpful clinical manifestation is the characteristic rash?

A. Yes.

Q. Sometimes that is not there?

A. Yes. [193-a]

Q. But clinically, isn't that the only thing to which you can attach a great deal of importance?

A. Yes, it is, as a rule, found. I merely stated that there are cases in which there has been no eruption.

Q. And your reading has led you to that conclusion?

A. Yes, my reading has.

Q. Pardon me, sir—has led you to the conclu-

(Testimony of Homer E. Marston.)

sion that in the vast majority of the cases rash does appear before death?      A. Yes, it does.

Q. And that death without rash is a rare and unusual occurrence?      A. Yes.

Q. Now, what kind of a white blood count, generally, accompanies a spotted fever case?

A. It runs, as a rule, between 8,000 and 12,000 and higher. I think the average is between 8,000 and 12,000 white cells.

Q. From your testimony it would appear that Doctor Barr had a very definite leucopenia?

A. Very definitely.

Q. In fact, he had only 2,800?      A. Yes.

Q. From your reading have you come to any conclusion as to what the characteristic growth pathology of the spleen in spotted fever cases is?

A. Yes; the spleen, as a rule, is enlarged and tender.

Q. And palpable?      A. And palpable.

Q. Even clinically you can feel it bulging out?

A. Yes.

Q. That is almost invariable, is it not?

A. Yes.

Q. In western cases, an accompaniment of spotted fever?

A. In most cases that you read about.

Q. Were you able, when you had this man in the hospital, to palpate his spleen?

A. No: we were unable to palpate it.

Q. You noticed, at the autopsy, did you not, that his spleen was [194] not enlarged?      A. Yes.

(Testimony of Homer E. Marston.)

Mr. Mackey: I think that is all.

Mr. Friedman: Q. Doctor, you referred to petechial rashes, and so forth. What is a petechial rash?

A. It is an extravasation of blood into the soft tissue, from the blood vessel.

Q. In giving your opinion to the question Mr. Taaffe asked you, as I understand it, you said in substance that due to the history of a tick bite, the abruptness of the onset of the disease, the period of incubation, and the pains, that Doctor Barr's death was most likely due to tick bite? A. Yes.

Q. Did I sum up your testimony correctly?

A. Yes.

Q. I am only referring to it as a basis for the next question. A. Yes.

Q. Considering all these things that you have included in your opinion and answer, is it not also possible that his death could have been from some other cause? A. It could have.

Q. And I believe, as you told Mr. Mackey, the opinion and conclusion that you have arrived at you would not have arrived at if there had been no history of tick bite? A. That is very likely.

Q. Is not delirium generally associated with high fever? A. In many cases, yes.

Q. You have referred to the fact that you have done some reading, which I gather from your testimony you have done as a matter of interest in the death of Doctor Barr. A. Yes.



(Testimony of Homer E. Marston.)

Q. You have no recollection of the various textbooks you have read, that is, the authorship of those books?      A. No.

Q. Nor of such bulletins or pamphlets that you may have in your office?      A. No. [195]

Q. Is there any way you have of refreshing your recollection on those readings? Have you read many volumes on it?      A. Many what?

Q. Many volumes.      A. No.

Q. Just a few? How many would you say?

A. Oh, I suppose I have read eight or ten articles on Rocky Mountain spotted fever.

Q. Anything else?

A. That is, articles in pamphlets or one or two textbooks.

Q. But you can't think of the name of one?

A. No, I do not recall the names.

Q. Do you think your memory could be refreshed if you were shown a list of publications?

A. It might be.

Q. Have you any of these available?

A. No, I have none with me.

Q. I do not mean here; I mean in your office.

A. Yes, I believe I have.

Q. Would it be putting too great a burden on you, Doctor, to ask you to look at the ones you have to see if they contain any statement about this rash, or the absence of rash?

A. I would be glad to do it.

Q. You might arrange with Mr. Taaffe by some means to come here as a result of that examination.



(Testimony of Homer E. Marston.)

A. I would be glad to do it.

Mr. Taaffe: I will gladly go over the matter with the doctor and submit the names of any articles or treatises on the subject. Then, I take it, in that connection, Mr. Friedman, if we are not to recall him back——

Mr. Friedman: I did not say we would not; I said we might not.

Mr. Taaffe: If we don't, we might read over many of those articles to substantiate that point.

[196]

Mr. Mackey: As far as that is concerned, we will enter into no such arrangement. We might go out and get a hundred articles he has not read.

Mr. Friedman: He can make a report of his findings to us, and I want doctors' articles.

The Court: Anything else?

Mr. Friedman: Q. Doctor, when did you form the opinion that the tick bite might have caused this death?

A. Well, I suspected it when the history was first given to me, that he had been bitten by a tick; that is one reason why I had called in Doctor Reed. I had never seen a case, and I believe that he had seen some, that he knew more about it than I did, so that is why I felt I needed consultation.

Q. I see; so that you had a suspicion of that?

A. Yes, I did.

Q. And that suspicion matured into a definite opinion at the time the man died, or subsequently?

A. Yes, I had had that suspicion right along.

(Testimony of Homer E. Marston.)

My opinion has never been real definite. I felt it was most likely that he died of that. It is possible that he did not. One of the workers over at Berkeley at the Department of Laboratories told me in that neighborhood where he had been hunting there had been cases of Rocky Mountain spotted fever. There also had been cases of plague, and that sort of thing.

Mr. Mackey: If the Court please, I think that should go out as hearsay.

The Witness: I am just telling you why I was suspicious.

Mr. Friedman: Q. I am asking you——

A. And why I felt that that was most likely the cause of his bronchial pneumonia. [197]

Q. But you are not at all certain at this time?

A. No, I am not.

Q. You simply feel that it was more likely to be that than something else? A. That is right.

Q. That is the sum and substance of your present state of mind, isn't it? A. Yes.

Q. Doctor, as the attending physician, you signed the death certificate of Doctor Barr, did you not? A. Yes.

Mr. Friedman: I think that is all.

The Court: Anything else, Mr. Taaffe?

Mr. Taaffe: Just one question.

#### Redirect Examination

Mr. Taaffe: Q. Doctor, do the symptoms and signs vary where death results after a short illness,

(Testimony of Homer E. Marston.)

from those where the illness is prolonged, in Rocky Mountain spotted fever?

A. You may not find all the signs in a fulminating case.

Q. This was a fulminating case, wasn't it?

A. This was what we call a fulminating case. He was overcome by the toxemia and you might not find all the signs.

Q. So that he was dead within 48 hours after you saw him?

A. Yes; I saw him on the 4th and he was dead on the 6th, less than 48 hours.

Q. His complaint to you, in the matter of the history which you took, was that the night before, the evening before, he did not feel well, he went home early; so this was within 72 hours of the time that we indicated that he felt bad, is that correct?

A. Yes.

Mr. Friedman: I think, if the Court would permit me, as part of the cross examination of this witness, I would like to offer a certified copy of the death certificate. [198]

The Court: Admitted.

(The death certificate referred to was received in evidence and marked Defendant's Exhibit B.)

Mr. Taaffe: May I ask one more question? I forgot to ask this. I made a note of it.

Q. Is bronchial pneumonia associated as a terminal cause of death with Rocky Mountain spotted fever?

A. Yes, it is.

(Testimony of Homer E. Marston.)

Q. So reported in the works on the subject, is that correct? A. Yes.

Mr. Taaffe: That is all.

### Recross Examination

Mr. Friedman: Q. It is likewise associated with many other diseases as the terminal cause of death?

A. Yes.

Q. In other words, it is a complication of many diseases, a secondary result? A. Yes, it is.

Q. The mere fact that there was a pneumonia, standing by itself, is no indication of what predisposing cause may have been of the pneumonia?

A. No.

Mr. Mackey: Q. Can you refer us, Doctor, to any text or authority which is to the effect that you may have pneumonia as a result of tick bite, without a precedent spotted fever?

A. I do not believe I said that.

Q. No; I said can you refer us to any text?

A. No.

Q. You know of no such case ever having occurred? A. No.

Mr. Mackey: Thank you.

The Court: We will take a short recess at this time.

(Recess.)

Mr. Taaffe: Mr. Nave was under cross examination.

The Court: Had you completed your cross examination of this witness, Mr. Friedman? [199]

(Testimony of Homer E. Marston.)

Mr. Friedman: I do not think I have any further questions.

The Court: Of this witness?

Mr. Friedman: No, your Honor.

Mr. Mackey: With your Honor's permission I would like to cross examine the witness briefly. .

The Court: Very well.

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LOUIS NAVE,

recalled for the plaintiffs; previously sworn.

Cross Examination

Mr. Mackey: Q. Mr. Nave, was Arthur Barr at any time confined to bed with a bad cold during this hunting trip?

A. With a cold?

Q. Yes.

A. No, not that I know of. Probably had a cold.

Q. He probably had a cold?

A. Well, since the time I knew him he might have had a cold off and on, but that particular time——

Q. I am referring to the time when you were hunting with him in Lassen County.

A. Lassen County? No.

Q. No sign of a cold? A. No, not at all.

Q. When you got to the third day of the hunting had he shown any signs of a cold? A. No.

Q. Was he coughing? A. No.

Q. Was he sneezing?

A. No, not that I know of.

(Testimony of Louis Nave.)

Q. Was his nose running?

A. No, I don't remember.

Q. Was he frequently blowing his nose?

A. I don't keep track of that. I don't know if he was blowing his nose or not.

Q. Are you sure he did not have a bad cold while he was up there?

A. He wasn't coughing, nothing like that. He didn't complain of anything. [200]

Q. But he might have been sneezing frequently?

A. Well, not that I remember.

Q. You are pretty sure he was not?

A. No, I wouldn't say that; I don't know.

Q. This rash that you noticed that was heavy on the wrists and which faded from the upper part of the arm, what did it do in the other direction, towards the hand?

A. What do you mean?

Q. Did the rash extend over his hands?

A. Well, I didn't pay particular attention to that. He just called my attention to it, and I saw his wrist and his arm, and I saw he had this spot on him. I asked him what it was. He said, "I don't know. I guess it's nervousness." And that is all. I just went about reading the paper.

Q. Had you ever seen that kind of rash on him before on any hunting trips?

A. No.

Q. Did he ever have any rashes before, to your knowledge?

A. No, not that I know of.

Q. You were with him at all times until he returned to San Rafael, except when he went fishing early on the morning of the 1st?

A. Yes.



(Testimony of Louis Nave.)

Q. Did he still have the rash on his way home?

A. No, he didn't say anything about it.

Q. Was it a rash which you, yourself, would not have noticed had he not called your attention to it?

A. Well, I was reading a paper. I was in bed. I never looked him over. If he hadn't called my attention to it I wouldn't have known it.

Q. I am still not clear as to whether he had a rash on his hands.

A. Well, I didn't examine him. As I said, I noticed he had a rash on here (indicating), on his arm. Of course, I couldn't [201] say from there up. He had a paper in his hand, reading.

Q. At least, you did not notice any rash on his hands as he returned to San Rafael?

A. No, I didn't even give it a thought to look at it.

Q. I will hand you what purports to be a statement which you signed, and I will ask you if that is your signature, Mr. Nave?

A. Yes, that is my signature.

Q. I will call your attention to the second paragraph of that statement. Will you read that over, please (handing document to the witness)?

A. I didn't write that.

Q. Did you read that statement before you signed it?

A. No; he just asked me the questions and I didn't know what he was writing.

Q. This statement was signed by you in the presence of Mr. Tulak?

(Testimony of Louis Nave.)

A. Who? I didn't—

Q. Mr. Tulak.

A. I didn't know him. Who is Tulak?

Q. He is a representative of the Equitable Assurance Society.

A. The man who wrote that down—I was working—he asked me questions, he was writing, and then he asked me to sign it.

Q. Did you read it over? A. No.

Q. Didn't you read it over and call certain misstatements in it to his attention?

A. Not that I remember of.

Q. Let me call your attention to the second page, where the initials "L. N." appear, where changes have been made. Are those your initials? At each of the places?

A. Yes, those are my initials.

Q. But you would say you did not read that statement before you signed it?

A. I don't remember reading it. It is so long ago I don't remember it. I might have read it. I don't know.

Q. And in paragraph 2 of this statement there appears (reading): [202]

"Doctor Barr has been troubled with hay fever for several years, and on Saturday, May 30th, he mentioned that it was bothering him. I noticed that his nose was running and that he was blowing his nose frequently. This was the last day of the hunt."

Does that tend to refresh your recollection as to

(Testimony of Louis Nave.)

whether he was suffering with some respiratory troubles at that time?

A. Oh, I don't know—if he had hay fever, he may have blew his nose.

Q. Was he blowing his nose frequently?

A. I couldn't say that.

Q. Was his nose running?

A. I never looked at it. His nose might have been running, but I couldn't distinguish whether he had a runny nose, a cold, or a hay fever; I don't know.

Q. And you signed this statement, yourself, to the effect that his nose was running, and that he was blowing his nose frequently, without reading it?

Mr. Taaffe: When was that statement sent in, counsel?

Mr. Mackey: June 10, 1942.

Mr. Taaffe: June 10th?

Mr. Mackey: Yes.

A. I might have read it. I don't remember. It was so long ago.

Mr. Mackey: I offer that in evidence, your Honor.

Mr. Taaffe: No objection.

The Court: Defendant's Exhibit C.

(The statement referred to was received in evidence and marked Defendant's Exhibit C.)

The Court: Is that all?

Mr. Mackey: Yes.

The Court: Anything further? [203]

Mr. Taaffe: No, your Honor.

MRS. GERTRUDE H. RICHARDSON,

called for the plaintiffs; sworn.

The Court: Q. Please state your full name.

A. Gertrude H. Richardson.

Direct Examination

Mr. Taaffe: Q. Your occupation is that of housewife, Mrs. Richardson?

A. Yes.

Q. You are a lady of family? A. Yes.

Q. Your family consists of what?

A. Two sons.

Q. Your husband and two sons? A. Yes.

Q. And you are a resident of San Rafael, Marin County? A. Of Ross.

Q. Ross, Marin County. You are, and have been, a friend of the Barr family for many years, is that correct? A. Yes.

Q. And a frequent visitor to the home of Doctor Barr, and since his death to the same home where his widow still resides, is that correct?

A. Yes, it is.

Q. Mrs. Richardson, on the evening of June 1st, if that was the date, 1942, when Doctor Arthur Barr returned from the antelope hunting trip, were you at his home? A. Yes, I was.

Q. Who was there with you at that time?

A. Mrs. Barr and her mother, Mrs. Heydenfeldt.

Q. Mrs. Zeila Barr and Mrs. Heydenfeldt, the mother of Mrs. Zeila Barr, is that right.

A. Yes.

(Testimony of Mrs. Gertrude H. Richardson.)

Q. At that time did you see any rash on any part of the body of Arthur Barr?

A. Yes, I did.

Q. Will you state the circumstances under which you saw that rash and where it was? [204]

A. We had been discussing the trip. He was telling us about the trip. And he said that, "I am going upstairs now and take a shower." And he started out of the room, and he said, "I have this rash on the back of my legs." And he pulled up his trousers and showed us the rash.

Q. Where was the rash?

A. On the calf of his leg, from the knee down.

Q. How far down, about?

A. Oh, maybe half-way down. I wouldn't know exactly. But it was on this—from the knee down.

Q. Was it on one leg or two legs?

A. On two—on both legs.

Mr. Taaffe: That is all.

#### Cross Examination

Mr. Mackey: Q. He pulled up his trousers on both legs to show you the rash?

A. Yes, he pulled up one, and then the other.

Q. And that rash extended half-way from the calf to the ankle?

A. From the knee down, I would say, yes.

Q. Where did it stop?

A. Maybe half-way down the calf of the leg.

Q. You did not see any rash at any lower point?

A. I didn't notice any other.

Q. What did the rash look like?

(Testimony of Mrs. Gertrude H. Richardson.)

A. Well, it was rather a spotty looking rash. I didn't look at it very closely, but it was quite red, and I would say spotty looking.

Q. Did he at that time say that the rash was due to nervousness?

A. No, he didn't say what it was due to.

Q. Do you know whether he was allergic to rashes? A. What is it?

Q. Do you know whether he ever had had rashes before? [205] A. No, I do not know.

Q. What was the color of the rash?

A. Red.

Q. Did it consist of spots?

A. Yes; rather spotty.

Q. I beg your pardon?

A. It was quite spotty; spotted, I would say.

Q. How large were the spots?

A. Well, gave the impression of being solid, and it was—I mean, they were very close, I would say.

Q. Do you mean that each unit of the rash was merged into a whole, or an entire area of redness?

A. Well, it would just give the impression of being red in the back of his leg.

Q. Did it look like sunburn?

A. No, I don't think it would be like sunburn.

Q. Can you compare it to anything that you have ever seen? A. I didn't hear that.

Q. Could you compare it to anything with which we are familiar? A. Nothing I had ever seen.

Q. You never saw anything like it before?

A. No.



(Testimony of Mrs. Gertrude H. Richardson.)

Q. Wherein did it differ from any rash that you had ever seen before?

A. The only rashes I had seen before would be measles on my children.

Q. And this did not look anything like that?

A. I didn't think it resembled that.

Q. Was it a very heavy rash?

A. I wouldn't say very heavy, not so that it would——

Q. Did it resemble sunburn in any way?

A. No, I don't think you would call it sunburn.

Q. Did you see him subsequent to that day, or that evening?

A. It was more like little blistery bumps.

Q. Did you see Mr. Barr the next day?

A. No; I didn't [206] see him the next day.

Q. Did you see him at any time thereafter, before he became ill?

A. I saw him—no, I saw him the day he became ill, Thursday. He was, I would say, in a coma, almost, when I saw him then. That was Thursday afternoon.

Mr. Mackey: That is all.

Mr. Friedman: Q. When did you say you saw this rash? What day was it?

A. That was on Monday, I believe, the day he returned from his trip.

Q. You say this rash had little bumps on it?

A. Yes, that is what I would say.

Q. Did it look like hives?

A. Not as large as I would know hives.

(Testimony of Mrs. Gertrude H. Richardson.)

Q. Well, you can't say it had the protruding effect as hives—raised? There were raised spots?

A. That is the way it looked, just like little bumps.

Q. You did not examine it very closely, did you?

A. No, I didn't examine it very closely.

Q. In ther words, all the doctor did was pull up his trousers, say, "Look, I have this rash." You took a look at it, and that was the end of it?

A. That was the last.

Mr. Friedman: That is all.

Mr. Taaffe: That is all, Mrs. Richardson, thank you.

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MRS. GRACE HEYDENFELDT,

called for the plaintiffs; sworn.

The Clerk: Q. Your full name, please?

A. Grace G. Heydenfeldt.

Direct Examination

Mr. Taaffe: Q. Mrs. Heydenfeldt, you are the mother of Mrs. [207] Zeila Barr? A. I am.

Q. And Arthur Barr was your son-in-law, is that correct? A. Yes.

Q. Were you at the home of your daughter and Doctor Barr on Monday, I believe it was, June 1, 1942, the day on which he returned from the ante-lope hunting trip? A. Yes, I was.

Q. Who was at that home with you at that time?

A. Well, Mrs. Richardson was there, and, I

(Testimony of Mrs. Grace Heydenfeldt.)

don't know, there were quite a few others. I didn't know all their names.

Q. Was your daughter there?

A. Yes, she was home.

Q. Did you see any rash on Doctor Barr's body on that day?

A. Well, on the back of his leg—he pulled up and said he had a rash on the back of his legs, and then he was going up to take a shower, and it was all on the back of his leg, a red rash.

Q. On one leg or both legs? A. Both legs.

Q. How far down his legs, or just at what place on his legs was that rash?

A. Just on the calf of his legs around the back. I didn't notice particularly, but it looked to me like the measles.

Mr. Taaffe: That is all.

#### Cross Examination

Mr. Friedman: Q. You say it looked like measles? A. It did to me.

Q. Did it look like hives?

A. No, it looked like a rash that had broken out like the measles, or something like that.

Q. You mean by that that there was any pus coming out of this rash?

A. Of course, I was off at a distance, and I didn't scrutinize it enough to know exactly about that, but it looked like a red rash.

Q. Most rashes are red.

A. It looked like a measles rash, [208] something like that—just broken out. I didn't see any pus.

(Testimony of Mrs. Grace Heydenfeldt.)

I didn't examine it. He just said the rash had broken out on his legs and he was going to take a shower.

Q. A measles eruption without pus looks just the same as hives, doesn't it?

A. As far as I know, hives always comes in big blotches. I have never seen hives like that. I know quite a few who have had hives, and they come in big blotches, as big as a dime.

Q. And these were small, pimply-like eruptions?

A. Well, they were smaller than the hives rash.

Q. By the way, had you ever seen any rash on Doctor Barr before?      A. No, I never had.

Q. Did you ever know him to have a rash?

A. No.

Q. Did you ever know that he was allergic to certain foods to produce hives on him?

A. No, I never heard him to complain of anything. I thought he was absolutely healthy.

Q. You do know that he was allergic to certain things that would produce a rash?      A. No.

Q. You did not know that?

A. I never did.

Mr. Friedman: That is all.

Mr. Mackey: Q. Did these spots coalesce or run together?

A. No, no, they were just like a rash breaking out on anybody all over; just general, all over. They weren't anything that was noticeable one way or the other.

(Testimony of Mrs. Grace Heydenfeldt.)

Q. Like a cluster of small red dots?

A. Yes, just like a lot of rash all over.

Q. Did you ever see a rash that resulted from chafing?

A. No, not particularly.

Q. Did you ever see a rash that resembled this one, that you noted?

A. Well, it was reddish—it was kind of a very red [209] rash—I think redder than anything I had ever seen before.

Q. How far from the doctor were you when you noted the rash?

A. About as far away as I am from you.

Q. And he pulled up both of his trouser legs to his knees?

A. I don't know whether he pulled them up to his knees; he pulled them up a way, and then he said he was going up and take a shower, and that he had the rash on his legs. He didn't go into detail at all.

Q. Did you know, like Mrs. Ricardson, that that extended only about half-way down from the calves to the ankles?

A. Well, I couldn't testify to that, because we didn't so observe. I just saw he had a rash on his legs, and I didn't scrutinize it. He just said he had the rash and he was going up and take a shower.

Q. Did you see that rash on him at any subsequent time?

A. No, because I went home that next morning and I didn't see him again.

(Testimony of Mrs. Grace Heydenfeldt.)

Mr. Mickey: That is all.

Mr. Friedman: Q. May I ask one or two additional questions? They are rather minor. What time was this at night?

A. It was in the afternoon, I think.

Q. How was the doctor dressed?

A. He had on his old clothes, old hunting clothes.

Q. He still had his old hunting clothes on?

A. Yes.

Q. Did he have shoes or boots on?

A. Oh, I don't remember now on that. I know he had on a dark kind of hunting trousers. I don't know what they were. Kind of dark clothes. And he had a plaid kind of jacket on. I didn't notice particularly.

Q. He had some foot cover? A. Yes.

Q. Shoes, so far as you remember?

A. Yes. [210]

Q. He had socks on? A. Yes.

Q. Did he have these heavy woolen socks?

A. I couldn't tell you that for sure.

Q. You do not know what kind of socks?

A. That I couldn't tell you, because I didn't observe that particularly. I just noted—he said he had the rash, and he went up for the shower, and that is about all I know about it.

Q. If he had on socks, they came up somewhat on his legs, did they not? A. Yes.

Q. About how far up, would you say?



(Testimony of Mrs. Grace Heydenfeldt.)

A. Well, I really didn't notice all of them. I just noticed—he said he had the rash, and I looked at it, but I didn't scrutinize it enough to tell you the inches up and down.

Q. Isn't it a fact, Mrs. Heydenfeldt, all you remember is he said he had the rash, he pulled up his pants, you noticed his legs were red, and that was about all? A. Yes.

Q. About what time of the day was this?

A. It was before dinner. I don't know exactly what time, whether it was half-past four or five; I didn't notice the time at all.

Q. You would say it was somewhere between 4:00 and 6:00?

A. Yes, somewhere before dinner.

Q. As I understand it, you were about the distance from the doctor as you are now from Mr. Mackey? A. Yes, just about.

Q. A distance of some 12 or 14 feet?

A. Yes, just about.

Mr. Friedman: That is all.

Mr. Taaffe: The next witness will be longer than five minutes, your Honor.

The Court: Let us go a little longer. [211]

MRS. ZEILA BARR,

called for the plaintiffs; sworn.

The Clerk: Q. Your name is Zeila Barr?

A. Zeila Barr.

Direct Examination

Mr. Taaffe: Q. Mrs. Barr, you are the widow of Doctor Arthur Barr, is that correct?

A. Yes, that is.

Q. And you are the plaintiff in the action against the Equitable Life Assurance Society of America, is that correct? A. Yes, that is.

Q. William H. Barr and Agnes D. Barr, Plaintiffs, through you as their guardian, in the action against the Travelers Insurance Company, are your children, is that correct?

A. Yes, that is correct.

Q. And Doctor Barr was the father of those children, is that correct? A. He was.

Mr. Taaffe: I take it there is no question—I do not remember what the state of the pleadings is—that Mrs. Barr was appointed the guardian ad litem? There is no question about that?

Mr. Mackey: I know of none.

Mr. Taaffe: Due to their minority, and the like.

Q. How old is your son, William Barr, the plaintiff?

A. He was just 18 on the 27th of September.

Q. On the 27th of last month?

A. Last month.

Q. And he is in the United States Navy as an

(Testimony of Mrs. Zeila Barr.)

apprentice seaman, having enlisted when he was 17 years old, is that correct, several months back?

A. Yes, he did, in June.

Q. And he has not been in the courtroom, and the reason for it is he has been engaged in his naval duties, is that so? [212]

A. Yes.

Q. How old is Agnes Barr, your daughter and co-plaintiff?

A. She is 16.

Q. She was in the courtroom today earlier?

A. Yes, she was.

Q. She has gone home since?

A. Yes; I seen her home.

Q. How long were you and Doctor Barr married, Mrs. Barr?

A. It will be 19 years November 11th.

Q. 1943, is that correct?

A. This year, yes.

Q. And you lived at Forbes and High Streets, and you still live at Forbes and High Streets, San Rafael, California, is that true?

A. Yes, that is.

Q. Doctor Barr has been a dentist ever since you married him, throughout your married life, and for some years prior to that time, is that correct?

A. Yes.

Q. How old was he at the time of his death?

A. Fifty-two, I think.

Q. What was his condition of health? Was he a healthy individual?

A. Very healthy.

Q. You have heard the witnesses describe his outdoor activities as a hunter and a fisherman, is that correct?

A. Yes, that is correct.

(Testimony of Mrs. Zeila Barr.)

Q. If we may summarize that subject and leave it, he practically lived for his family and to hunt and fish? A. Yes.

Q. He hunted and fished throughout the open seasons, whenever during any part of the year they were open, is that true? A. That is true.

Q. Strong physically? A. Very.

Q. And an exceptionally good walker, is that correct? A. Yes, it is.

Q. Do you remember the occasion of his leaving on this antelope [213] trip about May 26 or May 27, 1942? A. Yes, I do.

Q. For Ravendale, or in the vicinity of Ravendale, Lassen County, California, is that so?

A. Yes.

Q. Were you in the home when he returned from that hunting trip on Monday, June 1st?

A. Yes, I was there.

Q. About what time of the day did Doctor Barr return?

A. Well, I would say it was around 5:00 or 5:30. It was before dinner.

Q. Were Mrs. Richardson and your mother there at that time? A. Yes, they were there.

Q. Mrs. Heydenfeldt? A. Yes.

Q. Did you observe a rash, or did you see a rash on any part of the body of Doctor Barr at that time? A. Yes, I did.

Q. State the circumstances under which you saw it.

(Testimony of Mrs. Zeila Barr.)

A. Well, we were talking, and he decided to take a shower, and just as he was going upstairs he pulled up his pants legs and showed us this rash on his leg.

Q. What did that rash look like to you, as you remember it?

A. Well, it was red and, I don't know, rather pimply, I thought.

Q. That is the only description you can give, is that correct?      A. Yes, it is, about.

Q. About where on his legs was that rash located?

A. Well, it was down under the knee cap and right about here (indicating). He pulled up his trousers, the old jeans, and it seemed to be down in back here (indicating), and he said it was under the knee cap at the time.

Q. You have indicated a point down to the middle of the calf, the middle of the leg, is that correct?

A. Yes; from there up.

Q. Some questions were asked by Mr. Friedman of your mother as [214] to what kind of footwear Doctor Barr had on on that occasion.      A. Yes.

Q. Do you remember what he then wore, or customarily wore?

A. Yes. I think he had on his shoes, a pair of black high shoes—you know, not too high, just old-fashioned shoes he had on.

Q. Did his stockings go above the calf of his leg?

A. Oh, no, he wore short wool socks.

(Testimony of Mrs. Zeila Barr.)

Q. By the way, he wore, as a rule, long underwear, didn't he? A. Yes, he did.

Q. Did he pull up his long underwear, that is, pants, at the time he showed the rash?

A. He did, yes.

Q. I think we will go from that point, jump ahead just a little bit. Did you call that rash, or did you tell Doctor Marston when he was called in on this case on the following Thursday, about the rash you had seen?

A. Yes, I did. That was the first thing I told Doctor Marston, that he complained of a rash.

Q. Did you look for the rash at that time with Doctor Marston? A. Yes, I did.

Q. Was the rash there on Thursday morning when you and Doctor Marston looked for it?

A. No, nothing to amount to anything.

Q. It was gone, is that it? A. Yes.

Q. Did Doctor Barr at any time after his return from that antelope hunting trip make any complaints concerning his health on the trip, that he had been ill to any extent whatsoever?

A. No, he did not.

Q. Do you remember what Doctor Barr did on Tuesday, the day after he returned from the antelope hunting trip?

A. The next day he went to the City. [215]

Q. For what purpose? What expressed purpose?

A. Well, he wanted to buy some new clothes, and he wanted a checkover by Doctor Briggs.



(Testimony of Mrs. Zeila Barr.)

Q. Did he say that he was sick or ill, in connection with his desire for a checkup?

A. No; he just felt he wanted a checkup, that was all.

Q. Did he come to the City the next day, or at least leave for the City? A. Yes, he did.

Q. As a matter of fact, you tried to make the appointment for him with Doctor Briggs' office, is that correct? A. Yes.

Q. And did he buy some new clothes on that day when he came to the City, on Tuesday?

A. Yes, he bought some shoes. I know he came home with shoes.

Q. Do you know whether he bought any clothing?

A. I don't know. In the excitement afterward I think a hat came to the house, but I am not positive. I am pretty sure, because I still have it there.

Q. Apparently a brand new hat, is that it?

A. Yes.

Q. He did buy a new pair of shoes on that trip to the City? A. Yes, he did.

Q. And brought that home with him himself?

A. Yes, and brought those home.

Q. Did he make any statement concerning his condition of health that night when he came home, on the day on which Doctor Briggs examined him?

A. Yes, he did. He came home, and he was very happy. Doctor Briggs told him he was perfectly—he was a perfect specimen, so he told us, for a man of his age.

(Testimony of Mrs. Zeila Barr.)

Q. Do you remember him kidding, or what you thought was kidding, what a wonderful specimen he was?

A. Yes, he was laughing; he was kidding. [216]

Q. Having visited Doctor Briggs on Tuesday, June 2, 1942, what did he do, if you remember, on Wednesday, June 3, 1942?

A. He went to the office that day.

Q. His dental offices were in San Rafael?

A. Yes.

Q. In the Alberts Building?

A. In the Alberts Building, yes.

Q. Did he come home for lunch that day?

A. No, he did not.

Q. What was his custom about coming home for lunch?      A. He never did.

Q. He ate down town in San Rafael as a rule?

A. Yes.

Q. You live down in the residential district of San Rafael?      A. Yes.

Q. What time did he come home that evening after the day's work in the office?

A. I would say around 5:30 or a quarter to 6:00; around that time.

Q. Was that around his usual hour?

A. Well, sometimes he came home later—6:00 it was, about.

Q. He had no exact hour at which he came home?      A. No, he did not.

Q. Do you remember what his actions were that

(Testimony of Mrs. Zeila Barr.)

evening at home, just with reference to supper, for instance?

A. Yes; he didn't touch his supper. He just pushed everything to his side.

Q. Did he make any statements as to why he was not eating?

A. He said he was not feeling well.

Q. Did you observe his appearance at that time?

A. Yes; his face was very flushed.

Q. By "flushed," do you mean very red?

A. Very red.

Q. By the way, Doctor Barr's face was very sun-tanned from his outdoor life, is that correct?

A. Yes. [217]

Q. And was quite dark, is that correct?

A. Yes, he was.

Q. His face was quite dark, his skin?

A. Yes, his skin.

Q. It was naturally dark, and that was increased——

A. Oh, yes, very much.

Q. By the sun, from his outdoor activity, is that so?

A. Yes.

Q. By the way, when, prior to his visit to Doctor Briggs' office, was Doctor Barr last attended by any physician, that you can remember?

A. Well, I can't remember, unless it was 1930 or 1931 that he was operated on for appendicitis.

Q. For a hernia, wasn't it?

A. And a hernia.

Q. For appendicitis and a hernia?

A. For appendicitis and a hernia.

(Testimony of Mrs. Zeila Barr.)

Q. That was by Doctor Coffey in San Francisco, is that correct?      A. Yes, it was.

Q. And with the exception of the operation for appendicitis and hernia in 1930 or 1931, had you ever known him to be attended by a doctor?

A. No.

Q. By the way, did Doctor Barr, at any time when he was talking about this rash on his leg, mention anything about a rash that he had seen on his wrist or arms in Reno?      A. No.

Q. Well, I will—the answer is no. There was no other rash mentioned. He did not mention—I will ask her this question—did he mention to you in connection with that rash that he had had a tick bite?      A. No, he did not.

Q. He did not. By the way, you did not sleep with him in the same room on the night of Wednesday, June 3rd, did you?      A. No, I did not.

Q. You and your mother had attended a graduation in San Francisco, is that correct?

A. Yes, I went to the City. [218]

Q. Of a girl friend, is that so?

A. Well, yes; my niece.

Q. Your son, Billy, slept in the same room in a twin bed with Doctor Barr that night when you were absent over in the City, is that correct?

A. Yes, that is correct.

Q. What was Doctor Barr's custom concerning the hour when he arose in the mornings?

A. Well, anytime from 7:30 on he was always up.

(Testimony of Mrs. Zeila Barr.)

Q. Did he sometimes rise earlier than that—  
6:00 to 6:30? A. Oh, yes.

Q. Very frequently? A. Very frequently.

Q. Did he get out of bed Thursday morning,  
June 4th, at his usual hour?

A. No, he did not.

Q. Did you know that there was anything wrong  
with him up to about 8:00 or 8:30 that morning?

A. No, I did not.

Q. Did the children get up at their usual hour?

A. Yes.

Q. Which is about what?

A. Well, they have to be in school around 8:00  
or 8:30.

Q. And you got them off to school?

A. Yes.

The Court: Mr. Taaffe, is it necessary to go over  
all of this matter? It is not altogether pleasant  
for her to go over, it seems, unless you have some  
additional fact that you think is necessary.

Mr. Taaffe: No, it is not. I am just leading up  
to the point where she discovered this illness. In  
other words, they asked these detailed questions  
about everything, and I want to trace it, because I  
expect these things to be asked on cross examina-  
tion. I will get to the point.

Q. When, on the morning of Thursday, June  
4th, did you first know there was something wrong  
with Doctor Barr?

A. Well, when he did not come downstairs for

(Testimony of Mrs. Zeila Barr.)

breakfast, and I [219] ran upstairs to see what was the matter with him.

Q. What was his condition when you went upstairs?

A. Well, I thought he was very sick.

Q. Did you ask him if he was going to work?

A. No, I did not. I just ran and phoned the office and said Doctor Barr would not be there.

Q. What did you notice about his condition that caused you to feel that he was sick?

A. Well, his face was still so terribly red, and he didn't pay much attention to me.

Q. Did you ask him questions? A. Yes.

Q. Did you get answers to the questions?

A. Yes, I got some answers, but he didn't seem to care much.

Q. Did you then call a doctor?

A. Yes, I did.

Q. About what time did you attempt to get the doctor?

A. Well, I must have tried right after that to get the doctor, and it was quite awhile before—he was out already on his calls.

Q. What time did he come there?

A. Well, it must have been around 10:30 or 11:00.

Q. Were you present when Doctor Marston was examining Doctor Barr that morning?

A. Yes.

Q. Did you hear questions asked of Doctor Barr by Doctor Marston? A. Yes, I did.



(Testimony of Mrs. Zeila Barr.)

Q. Was Doctor Barr able to answer all the questions, or did he answer all the questions that were asked him?      A. At times he did.

Q. And other times he did what?

A. He just didn't pay any attention.

Q. Do you remember some of the questions that were asked that morning and the answers that he gave or did not give? [220]

A. Well, I know Doctor asked him if he were in pain, and he said yes. And he asked him if it were war nerves, and he shook his head. He paid no attention to him. I remember the doctor asking him that—he said, “Are you listening to the war? Is it too much for you?” And he just wouldn't answer him.

Q. Did he take his temperature at that time?

A. Yes, he did.

Q. He did not state what it was?

A. No, he did not tell me.

Q. Did he prescribe certain things for you to do during the day for him?      A. Yes.

Q. And you carried out those instructions?

A. Yes.

Q. Throughout the day he became progressively worse, is that correct?      A. Yes, he did.

Q. Until late in the afternoon——

A. Doctor came back again, yes. I sent for him.

Q. Shortly after Doctor Marston left that morning did you try to get Doctor Briggs, also, on the phone?      A. Yes, I did.

Q. He had left for the East?

(Testimony of Mrs. Zeila Barr.)

A. He had gone east, the secretary told me.

Q. Did you administer certain medicines which had been prescribed that day? A. Yes, I did.

Q. Was he taken to the hospital in an ambulance that afternoon? A. Yes.

Q. Did you ever see him again alive after he was taken to the hospital?

A. Well, I was at the hospital many times, but they would not allow me in the room.

Q. Did you stand in the hallway and look in there? A. Yes.

Q. Did you observe what his condition was——

The Court: Do you have to go into all this?

Mr. Taaffe: No, your Honor. I do not think it is necessary.

Q. On the day of the autopsy, or the day before, did you find a [221] tick on Doctor Barr's clothes?

A. Yes, I did; I found a tick.

Q. On what part of his clothing?

A. It was on his—well, a shirt, I guess, that he had taken off.

Q. What did you do with that tick?

A. Well, his brother came in just at that time, and I said, "I think I have found a tick."

Q. You put a tick in a glass?

A. In a glass, yes.

Q. And then you afterwards delivered the tick to your brother-in-law, Mr. Ferguson, Lieutenant Commander Ferguson, is that correct?

A. He took it, yes.

The Court: Q. Is Mr. Ferguson your brother?

(Testimony of Mrs. Zeila Barr.)

A. No; my brother-in-law.

Q. It is your sister that is married to him——

A. No; Doctor Barr's sister was married.

Mr. Taaffe: I think that is all.

Mr. Mackey: I have no questions.

Mr. Friedman: No questions, your Honor.

Mr. Taaffe: I have one or two matters I want to check in the morning. I won't be but a few minutes in the morning, and I will finish.

The Court: You will have your witnesses tomorrow?

Mr. Friedman: We will be prepared to proceed in the morning.

The Court: The Court will adjourn until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Thursday, November 4, 1943, at 10:00 o'clock a. m.) [222]

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Thursday, November 4, 1943,

10:00 o'clock A. M.

The Clerk: Barr versus Travelers Insurance Company and The Equitable Life Assurance Company.

Mr. Taaffe: In this matter, may it please your Honor, subject to a check of the insurance policies and the possible offer of them in evidence—I think they are in the pleadings here—we will rest our case.

The Court: I do not quite understand what you mean.

Mr. Taaffe: I have not checked the pleadings, but I believe the pleadings contain the insurance policies.

The Court: I have the answers.

Mr. Taaffe: One answer does, definitely, and I believe the other, from the slight check I made——

The Court: You want to offer the policies in evidence?

Mr. Taaffe: Not if the pleadings admit they are the policies. I say subject to that we rest our case.

The Court: Is that your reservation, to offer the policies in evidence if the pleadings——

Mr. Taaffe: If the pleadings do not admit them—I believe they do. That is my recollection of the state of the record.

(Plaintiffs rest.)

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Mr. Friedman: At this time, if it please the Court, on behalf of the Defendant Travelers Insurance Company, and pursuant to the rule of the Supreme Court governing procedure in civil cases in the United States District Court, I move the Court for an order dismissing the action on the ground that neither under the law nor the facts is the plaintiff entitled to any relief in this case. To state it in another manner, it is our contention [223] that the plaintiff in this case has not sustained the burden of proof and has not established,

not only by that degree of evidence required by law, but, as a matter of fact, by any competent evidence, that the death of Doctor Barr was due to external violent and accidental means, within the meaning of the double indemnity provisions of this policy.

(Discussion on the motion.)

Mr. Mackey: If the Court please, on behalf of Equitable Life Assurance Society, we make the same motion and on the same grounds, and we concur thoroughly in the argument made by counsel, and I do not desire to make any extended argument, but I would like to point out one or two things to your Honor.

(Discussion on the motion.)

The Court: Gentlemen, if there were a scintilla of evidence in this matter, speaking colloquially of the rule that we used to learn about, I would favor the cause of the plaintiff here, because, after all, he paid for the insurance policy and should get the benefit of it. But despite my inclination in the matter and my opinions about it, after all, we have to be guided by the rules of law, and there is a burden of proof, Mr. Taaffe, that the plaintiff has to sustain. You have to have some evidence upon which the Court can find that there is a liability, or, at least, a *prima facie* case. It seems to me that the only evidence before the Court is the fact that the decedent was bitten by a tick. In the last analysis that is all we have. If we had added to that some medical opinion in which a doctor would testify that in his opinion the cause of death was



due to the disease being produced by the bite of this tick, then we might have enough to make a *prima facie* case.

All that Doctor Marston said was that it is most likely [224] that that was the cause of death, but it could have been caused by other causes.

Judge St. Sure has pretty well covered that situation in this case he has decided. There is no evidence at all; even no indication. If I had the feeling from the evidence in this case, Mr. Taaffe, that this man's death was due to the disease induced by the tick bite, I would consider it further and deny the motion of the defendants. But everything about the facts in this case, so far as the plaintiffs' case is concerned, leads me to believe that there really is not anything that you can put your finger on that, in a court of justice, would lead a trier of facts with an open mind to the conclusion that this man's death really was induced by a disease caused by the bite of a tick, because there is nothing but conjecture and speculation.

Doctor Marston, the witness who offered the strongest grounds on your behalf, if they exist, admitted an unfamiliarity with the thing, but that from what he read, if the man had been bitten by a tick, it was likely that that was the cause of death. But I can't see my way clear to say that that is a sufficient showing of the necessary facts.

Now, it is unfortunate that you do have a burden of proof. It may be, as you say, at the time this thing happened, that a different method of investigation might have produced some fact that would have gotten by this barrier of the burden of proof.



That is just one of those unfortunate things that happens. We have to take these cases as we find them, as they come, and if the facts are not there, they are not there, and the result is unfortunate.

It seems to me we can't make a determination in a court of law on that basis. I am convinced that there isn't any evidence [225] at all that sustains the burden of proof, much as I would like to find, frankly, some evidence to support the plaintiffs' claim in this case; but it just does not square with my conscience that any of those facts have been proved. It is possible that they might have been proved if you had an opportunity to make an investigation at the time, but, as I say, we have to take the situation as we find it.

I find myself compelled to grant the motion of the defendants for judgment.

Mr. Taaffe: Before taking formal action on it, if it please your Honor, if your Honor will pardon the interruption, I may have the opportunity of checking on those insurance policies, and it may be considered if I find that the pleadings are not complete on that subject, I can offer the policies in evidence?

The Court: If you have anything to present to clear your record or to add to your record in the matter, I will reopen the matter for that purpose.

Mr. Taaffe: For that purpose. It will only be in connection with the policies. That is understood, your Honor.

The Court: Yes.

[Endorsed]: Filed Feb. 2, 1944. [226]

In the District Court of the United States for the  
Northern District of California, Southern Di-  
vision

No. 22609 G

WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Plaintiffs,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Defendant.

### NOTICE OF APPEAL

Notice is hereby given that William H. Barr, a minor, and Agnes D. Barr, a minor, by Zeila H. Barr, their guardian, the plaintiffs in the above entitled action, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Final Judgment and Order of Dismissal heretofore, to-wit, on the 10th day of November, 1943, given, made and entered in and by the District Court of the United States for the Northern District of California, Southern Division, in the above entitled action, and from the whole of said Judgment, which said Judgment is in the words and figures following, to-wit:

“The above entitled action (consolidated with the case of Zeila Barr v. The Equitable Life Assurance [227] Society of the United States, No. 22613 R) having come on regularly for trial before the above entitled court, sitting without a jury, on November 2, 3, and 4, 1943, the plaintiffs being rep-

resented by John J. Taaffe, Esq., their attorney, and the defendant being represented by Messrs. O'Connor, Neubarth and Moran and Leo R. Friedman, Esq., its attorneys, and on said last mentioned date, the plaintiffs having completed the presentation of their evidence and having rested their case in chief, the defendant moved the above entitled court, under and pursuant to Rule 41(b) of the Rules of Civil Procedure for the District Courts of the United States, for a dismissal of the above entitled action on the ground that upon the facts and the law the plaintiffs had shown no right to relief, and plaintiff having objected to said motion and the motion having been argued by counsel for plaintiffs and counsel for defendant and the same having been submitted to the court for decision and the court finds that said motion is meritorious and should be granted and that under the law and upon the facts and the law the plaintiffs have shown no right to relief;

“It is hereby Ordered, Adjudged and Decreed that this court does hereby order, adjudge and decree that plaintiffs take nothing by reason of their complaint on file herein and that the above entitled action be and the same is hereby dismissed.

“Dated: November 10, 1943.

LOUIS E. GOODMAN,

United States District Judge.”

Dated: January 31, 1944.

KEITH R. FERGUSON,

JOHN J. TAAFFE,

Attorney for Plaintiffs.

[Endorsed]: Filed Jan. 31, 1944. [228]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Now come the above named plaintiffs, and, pursuant to the provisions of Subdivision D of Rule 75 of the Federal Rules of Civil Procedure, file this, their Designation of the Points on which they intend to rely on their Appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit Court.

1. That the said District Court erred in granting the motion of defendant for dismissal of said action under Rule 41B of the Rules of Civil Procedure for the District Courts of the United States.

2. That the said District Court erred in ruling that upon the facts and the law plaintiffs had shown no right to relief.

3. That the said District Court erred in finding that the [229] said motion was meritorious and that upon the facts and the law plaintiffs had shown no right to relief.

4. That the evidence introduced and received upon the trial of said cause established prima facie the right of plaintiffs to judgment as prayed for in their complaint on file herein, all of which from the reporter's transcript of the testimony and proceedings at the trial on file herein fully and at large appears.

Dated this 31st day of January, 1944.

JOHN J. TAAFFE,

KEITH R. FERGUSON,

Attorneys for Plaintiffs and  
Appellants.

Receipt of a copy of the foregoing Statement of Points is hereby acknowledged this 31st day of January, 1944.

JOS. T. O'CONNOR,

LEO R. FRIEDMAN,

Attorneys for Defendant and  
Appellee.

[Endorsed]: Filed Feb. 2, 1944. [230]

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Come now the above named plaintiffs, and, pursuant to the provisions of Rule 75 of the Federal Rules of Civil Procedure file this, their Designation of the portions of the Record, Proceedings and Evidence to be contained in the Record on their Appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1—The caption.

2—The names and addresses of counsel.

3—The complaint.

4—The order of removal of the cause from the Superior Court of the State of California, in and

for the City and County of San Francisco, to the United States District Court for the [231] Northern District of California, Southern Division.

5—The answer of defendant.

6—The order consolidating the action for trial with action numbered 22613 R entitled “Zeila Barr, plaintiff, vs. The Equitable Life Assurance Society of the United States, defendant”.

7—Judgment and order of dismissal.

8—The notice of appeal.

9—The designation of contents of record on appeal.

10—Statement of points on which appellant intends to rely on the appeal.

11—The full and complete reporter’s transcript of the evidence and proceedings at the trial.

Dated this 31st day of January, 1944.

JOHN J. TAAFE

KEITH R. FERGUSON

Attorneys for Plaintiff and  
Appellant.

Receipt of a copy of the within Designation of Contents of Record on Appeal acknowledged this 31st day of January, 1944.

JOS. T. O’CONNOR

LEO R. FRIEDMAN

Attorneys for Defendant and  
Appellee.

[Endorsed]: Filed Feb. 2, 1944. [232]



[Title of District Court and Cause.]

COUNTER-DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

Comes now The Travelers Insurance Company, appellee in the above entitled action, and files herewith its counter-designation of the parts of the record which it deems necessary for the consideration of the appeal of the above-entitled action.

1. The petition for removal of cause to the United States District Court.

2. Notice of petition for removal to the United States District Court (with bond for removal).

Dated: February 15th, 1944.

O'CONNOR, NEUBARTH &  
MORAN  
LEO R. FRIEDMAN

Attorneys for Appellee

Receipt of Service.

[Endorsed]: Filed Feb. 16, 1944. [233]

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[Title of District Court and Cause.]

ORDER ENLARGING TIME TO FILE  
RECORD AND DOCKET CASE

Good cause appearing therefor,

It Is Hereby Ordered that the plaintiffs in the above entitled action, who have heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment and Order of

Dismissal heretofore given and made in this cause in and by this Court, may have and they are hereby granted to and including the 8th day of April, 1944, in which to file the Record of Appeal and docket the case in the said Circuit Court of Appeals.

Dated: March 3, 1944.

LOUIS E. GOODMAN

Judge United States District  
Court

[Endorsed]: Filed Mar. 3, 1944. [234]

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District Court of the United States  
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 234 pages, numbered from 1 to 234, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of William H. Barr, Etc., et al., Plaintiffs, v. The Travelers Insurance Company, Defendant. No. 22609-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Twenty-five dollars and thirty-five cents (\$25.35) and that the said amount has

been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 6th day of April, A. D. 1944.

(Seal)

C. W. CALBREATH

Clerk

By WM. J. CROSBY

Deputy Clerk.

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[Endorced]: No. 20728. United States Circuit Court of Appeals for the Ninth Circuit. William H. Barr, a minor and Agnes D. Barr, a minor, by Zeila H. Barr, their guardian, Appellants, vs. The Travelers Insurance Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 7, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10728

WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Appellants,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Appellee.

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ZEILA BARR,

Appellant,

vs.

THE EQUITABLE LIFE ASSURANCE SO-  
CIETY OF THE UNITED STATES,  
Appellee.

ORDER CONSOLIDATING APPEALS FOR  
HEARING

The causes entitled as above having been consolidated for trial in the District Court, and the same evidence and proceedings in said District Court having been introduced upon the one trial as to both causes, and the questions presented by each of said appeals being the same and there being no necessity for printing the said evidence in separate transcripts; and counsel for the respective parties having stipulated thereto; it is therefore

Ordered that said appeals be consolidated for hearing in one transcript consisting of the pleadings and judgment roll in each of said actions, together with the several notices of appeal and the several designations of the portion of the record to be used on said appeal, and the several statements of the points relied upon by the appellants on said appeal with a single transcript of the testimony and proceedings taken and had in the said District Court on the trial of said consolidated actions.

Dated this 11th day of February, 1944.

CURTIS D. WILBUR

United States Circuit Judge

The foregoing Order is hereby consented to.

JOHN J. TAAFE

KEITH R. FERGUSON

Attorneys for Appellants.

JOS. T. O'CONNOR

LEO R. FRIEDMAN

Attorneys for Appellee, The  
Travelers Insurance Com-  
pany.

PILLSBURY, MADISON &  
SUTRO

NORBERT KORTE

Attorneys for Appellee, The  
Equitable Life Assurance  
Society of the United States

[Endorsed]: Filed Feb. 11, 1944. Paul P.  
O'Brien, Clerk.

[Endorsed]: Re-Filed Apr. 7, 1944. Paul P.  
O'Brien, Clerk.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10728

WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Appellants,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Appellee.

STATEMENT OF THE POINTS ON WHICH  
APPELLANTS INTEND TO RELY ON  
APPEAL

Now come the above named appellants and pursuant to the provisions of Section 6 of Rule 19 of this Court file this, their Statement of the Points on which they intend to rely on the appeal and designate herewith the parts of the record which they think necessary for the consideration thereof. In this behalf the said appellants hereby adopt their Statement of Points on which Appellants Intend to Rely on Appeal filed in the District Court of the United States for the Northern District of California, Southern Division, the Court from which this appeal is taken, which said statement is a part of the Record on Appeal in the above entitled cause; and appellants hereby designate all of the said Record on Appeal as necessary for the consideration of said appeal.



Dated, this 8th day of April, 1944.

KEITH R. FERGUSON

JOHN J. TAAFE

Attorneys for Appellants

Receipt of a copy of the within Statement is hereby acknowledged this 8th day of April, 1944.

O'CONNOR, NEUBARTH &

MORAN

LEO R. FRIEDMAN

Attorneys for Appellee

[Endorsed]: Filed April 8, 1944. Paul P.  
O'Brien, Clerk.

